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DMCA, Fair Use and the Librarian:
A Case for Negotiated Rulemaking

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DMCA, FAIR USE, AND THE LIBRARIAN:
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By

Guillermo R. Carranza[*]

I. INTRODUCTION.

The Internet[1] poses the ultimate paradox for copyright owners. The medium makes it so easy to disseminate a work of authorship that anyone, with little more than a desire to do so, can now publish a book, a play, distribute movies, and music; all of which can be enjoyed simultaneously by an unimaginable number of people all over the world. Yet, simply because a work of authorship has become so easy to disseminate in digital form, the Internet also threatens the very economic value of copyrighted works.[2] Professor Jane Ginsburg describes the promise and peril inherent

[*] I wish to thank Professor Roger E. Schechter, William Thomas Fryer Research Professor of Law, The George Washington University Law School for his invaluable guidance. Any errors and omissions in this thesis are of course mine.

[1] The Internet has been generally described as "a giant network which interconnects innumerable smaller groups of linked computers. It is thus a network of networks." ACLU v. Reno, 929 F.Supp. 824, 831 (E.D. Pa. 1996). While the activity discussed in this paper can be more precisely described as taking place on the World Wide Web rather than on the Internet, the terms will be used interchangeably throughout this paper. *See generally* Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 83 MINN. L. REV. 609 (1998). Professor O'Rourke notes there are many different definitions of the web ranging from "a particular application on the Internet" to "a series of documents stored in different computers all over the Internet" and "a network of computers, all of which run software conforming to Web standards." *Id.* at 620 n. 43. However, she goes on to note that "[a]lthough the Internet and the web are not synonymous, '[t]o most users and businesses, the World Wide Web...is the Internet,'" *Id.* at 611 n. 3.

[2] Because a copyrighted work is, at its core, an idea expressed in an original way, its economic value is based entirely on the right to exclude someone other than the property owner or licensee from exploiting the market for that particular expression. This is because a copyright, like other forms of intellectual property, is what economists describe as a nonrivalrous good. Essentially, this means "[c]opying a digital work does not remove it from the possession of its owner; it simply creates more supply, thereby diminishing the value of each copy." Jason M. Schultz, Comment, *Taking a Bite Out of Circumvention: Analyzing 17 U.S.C. § 1201 as a Criminal Law*, 6 MICH. TELECOMM. & TECH. L. REV. 1, 11-12 (2000). Controlling access does not necessarily affect the value of the work itself, but rather a distinct "market for access to the work." *Id.* at 13.

in the dissemination of copyrighted matter over the Internet as follows: "On the one hand, authors [are] able to disseminate their works to the entire world of online users. On the other hand, this kind of dissemination ensures neither payment nor the security that users will not copy, alter, or further circulate the author's work."[3]

The realization that technology has significantly increased the risk to the economic value of a copyright has led to a significant change in the way copyright owners seek to protect their intellectual property. Increasingly, copyright owners have turned to technological self-help measures in order to control access to and prevent the copying and dissemination of their intellectual property. However, technological locks have their own limitations. "[T]echnical protection measures—no matter how strong–will always be vulnerable to attack by dedicated hackers, especially because the processing capabilities of computer hardware and software continue to increase."[4]

Understanding that "what one technology can do, another can generally undo,"[5] copyright owners have sought legal protection for these self-help measures. In late 1996, the World Intellectual Property Organization (WIPO) ratified the WIPO Copyright Treaty.[6] This treaty obligates signatory nations to "provide adequate legal protection and effective legal remedies against the circumvention of effective

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[3] Jane C. Ginsburg, *Putting Cars on the "Information Superhighway:" Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1467 (1995).

[4] Dean S. Marks & Bruce H. Turnbull, *Technical Protection Measures: The Intersection of Technology, Law, and Commercial Licenses*, 22 E.I.P.R. 198, 199 (2000).

[5] Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 410 (1997). *See also* Dr. Mihaly Fiscor, *The Spring 1997 Horace S. Manges Lecture -- Copyright for the Digital Era: The WIPO "Internet" Treaties*, 21 COLUM.-VLA J.L & ARTS 197, 216 (1997).

[6] *See* David Nimmer, *A Tale of Two Treaties Dateline: Geneva – December 1996*, 22 COLUM.-VLA J.L. & ARTS 1, 4-5 (1997).

technological measures ... which are not authorized by the authors concerned or permitted by law."[7] In the United States, this treaty obligation is implemented by Title I of the Digital Millennium Copyright Act (DMCA).[8]

Adoption of DMCA has been quite controversial. In particular, a provision prohibiting any circumvention of access control measures[9] has raised significant concerns about DMCA's impact on broader economic and social policy. In a compromise move, Congress delayed implementation of the circumvention of access controls prohibition[10] and charged the Librarian of Congress with determining, in an administrative rulemaking proceeding, whether exceptions to the blanket prohibition are appropriate.[11] The Librarian issued his final rule on October 28, 2000.[12] Yet, much of the information developed during the rulemaking continued to focus on whether the anti-circumvention prohibition is good public policy instead of assessing the realistic impact of current and future technological protection measures on the public availability of copyrighted works, which is what Congress sought when it

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[7] WIPO Copyright Treaty, *adopted by* the Diplomatic Conference on Dec. 20, 1996, art. 11, *available at* <http://www.wipo.int/treaties/ip/copyright/copyright.html>. A similar provision was included in the WIPO Performances and Phonograms Treaty, *adopted by* the Diplomatic Conference on Dec 20, 1996, art. 18, *available at* <http://www.wipo.int/treaties/ip/performances/performances.html>.

[8] 17 U.S.C. §§ 1201-1205.

[9] 17 U.S.C. § 1201(a)(1)(A). An access control measure has been broadly defined as one that, "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. § 1201(a)(3)(B). Examples of what Congress considered an access control measure include the use of passwords in computer programs or the encryption and scrambling of cable programming, motion pictures on videocassettes, and music on CD-ROMs. *See generally* H.R. REP. NO. 105-551, pt. 2, at 37 (1998).

[10] 17 U.S.C. § 1201(a)(1)(A).

[11] 17 U.S.C. §§ 1201(a)(1)(C) & (D).

[12] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64556 (October 27, 2000) (to be codified at 37 C.F.R. pt. 201).

directed the rulemaking. Moreover, there has been very little, if any, discussion about how to adapt technological protection measures, granting appropriate exemptions to the law, in a way that alleviates the concerns of copyright owners while still insuring the widespread public availability of copyrighted works.

In developing the rule that emerged in late 2000, the Librarian engaged in traditional notice and comment rulemaking. He was not, however, obliged to do so. Federal law authorizes the Librarian to use an alternative technique known as "negotiated rulemaking" or "reg-neg" instead.[13] Reg-neg supplements traditional notice and comment rulemaking by bringing together interested private parties and public officials to actually write the administrative rule. Experience with reg-neg has been regarded as generally successful in bridging gaps between the competing interests and devising creative solutions to problems even in highly contentious situations with complex technical issues.

This thesis contends that reg-neg is a superior methodology for balancing the many interests involved in designing exceptions to the anti-circumvention provisions of DMCA, and that the Librarian should use reg-neg in future rulemakings. Part II provides outlines the controversy surrounding the legal protection of access controls. Part III explains the congressional mandate behind the rulemaking procedure, discusses the Librarian's initial rulemaking and highlights problems inherent in the traditional notice and comment rulemaking. Finally, Part IV proposes the use of

[13] 5 U.S.C. §§ 561-570.

negotiated rulemaking as an alternative and outlines the need for statutory changes to authorize Librarian engage in meaningful reg-neg.[14]

[14] A similar suggestion for regulating Internet Service Provider infringement liability was proposed in Timothy L. Skelton, Comment, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219 (1998).

II. USE OF ACCESS CONTROL MEASURES AND THEIR IMPACT ON THE PUBLIC AVAILABILITY OF INFORMATION.

A. BACKGROUND.

Challenges to copyright enforcement are not new. In one form or another, the tension between copyright owners and information consumers has existed for centuries. Only the technology and the means of distributing copyrighted works have changed. One scholar characterized the situation as follows: "[w]hether an idea is distributed by computer network, printing press, or word of mouth, ... the distribution costs for disseminating an intellectual good [are] minimal or nonexistent. Once intellectual goods are disclosed, there are no real barriers to the free appropriation of the good."[15] In many ways, this dilemma has always been about, and continues to be about, the extent to which copyright owners can effectively limit dissemination of their works to authorized distribution channels. What has changed in the digital environment is how quickly pirated works and private copies can enter the market and the number of potential consumers who can almost immediately get a copy of a work outside these authorized distribution channels.

The current threat to the copyright industries comes, not just from the fact digital copies are easy to make, but also from the fact they are qualitatively indistinguishable from the original work. As Professor Lessig notes, "[m]ost people worry about copyright in terms of the ease of making copies. In the digital world, not only the ease is at issue, but also the fact that the digital copy is as perfect as the original and, with some fancy computing, even better ... a copy can be cleaned up,

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[15] Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 25-26 (1993).

enhanced, and have noise removed. The copy is perfect."[16] In a digital environment, pirated copies are interchangeable with authorized copies. A consumer who wants to obtain copyrighted material for free no longer has to settle for a degraded or inferior copy – he or she can often obtain versions that are qualitatively equal or superior to authorized copies for no cost at all by simply logging on to the Internet. By eliminating the trade-off between price and quality for the consumer, digital distribution makes the pirated copy a better deal because the pirated product will be nothing less than an identical, but less expensive version, of the original.

Yet, a situation where the fruits of one's labor can be consistently provided to consumers for free is not necessarily good for anyone in the end. While all creators of intellectual work product can be adversely affected by the loss of revenue attributable to piracy, the implications are likely to be especially severe in research-intensive industries. Almost any research-intensive industry will be negatively impacted by piracy because of the large expenditures of time, money, and creative effort needed to develop products. The ease with which their products can be copied and exploited can have significant impacts on corporate endeavors in highly competitive industries where technological progress is so rapid that products have relatively short life cycles and where success almost always requires products be marketed in at least two or three world markets.[17] Many argue that without adequate intellectual property protection, high technology industries producing "semiconductors, computer

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[16] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 125, 264 n. 15 (1999).

[17] Jack E. Brown, *The Protection of High Technology Intellectual Property: An International Perspective*, 7 NO. 12 COMPUTER LAW. 17 (1990).

programs, graphics, interfaces, and databases" face significant economic disincentives to engage in continued research and development.[18]

The widespread embodiment of intellectual work product in digital media has been accompanied by changes in the way copies are disseminated; all made possible by the pervasiveness of the Internet. Some postulate that "[m]uch copying in cyberspace will be 'private,' because intermediaries, such as traditional publishers (and booksellers and librarians) who reproduce, package and distribute copies to end users, will no longer be necessary. As a result, the market for, or 'normal exploitation of,' the work will by and large be the private copying market."[19] This empowerment of consumers to "buy direct" from the creators of intellectual property has, in turn, led to the development of more software and electronic devices, which make it easier for the private consumer of electronic information to obtain perfect copies. As the following excerpt indicates, this situation has heightened tensions between copyright owners and those developers and manufacturers of these devices.

> [I]nformation content providers who depend heavily on copyright law are growing increasingly wary of advances in digital technology that allow manipulation of their content and potentially diminish the effectiveness of their copyright protection. Technology firms on the other hand, are looking more and more at developing products which provide low-cost, high quality access to content without restrictions. Thus as technologists work feverishly to find new ways to free up information, content providers are fighting just as hard to constrain access in order to prevent market-killing duplication and distribution of their works.[20]

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[18] *Id.*

[19] Ginsburg *supra* note 3, at 1477-78.

[20] Schultz, *supra* note 2, at 2-3.

As technologists work harder to enable private copying, the enforcement of copyright on the Internet must now target a greater and more diverse group of potential infringers than ever before. Professor Ginsburg explains the problem thus:

> Copyright owners have traditionally avoided targeting end users of copyrighted works. This is in part because pursuing the ultimate consumer is costly and unpopular. But the primary reason has been because end users did not copy works of authorship -- or if they did copy, the reproduction was insignificant and rarely the subject of widespread further dissemination. Rather, the entities creating and disseminating copies ... were intermediaries between the creators and the end users.... Infringements, rather than being spread throughout the user population, were concentrated higher up the chain of distribution of works.... *By contrast, in cyberspace individuals will often commit the unauthorized acts, both for private consumption and for further dissemination to other individuals.*[21]

Complicating enforcement against digital pirates who engage in the redistribution of copyrighted works is the fact "pirates can make themselves completely anonymous and thus difficult for the authorities to track down via the Internet. [Use of anonymous remailers, for example, make] it virtually impossible to trace an e-mail message to its actual sender."[22] The dedicated pirate can also pose as a fictitious person, steal another person's identity, or even hack into another person's computer and use it as a platform from which to steal and disseminate pirated material.[23] This makes traditional copyright enforcement mechanisms increasingly ineffective.

These challenges are, or course, magnified by the open architecture of the Internet itself, which is a largely unregulated "convergence of telecommunications

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[21] Ginsburg *supra* note 3, at 1488 (emphasis added).

[22] Shahram A. Shayesteh, Comment, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY.L.A. L. REV. 183, 193 (1999).

[23] *Id.*

and computer systems"[24] that makes information both immediately and simultaneously accessible to millions of people across the globe.

> The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole....
>
> ....
>
> No single entity -- academic, corporate, government, or non-profit -- administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decide to use common data transfer protocols to exchange communications and information with other computers.... There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.[25]

The Internet's very structure, therefore, makes enforcement of intellectual property rights difficult, if for no other reason than the speed at which a copyright owner must react in order to preserve his or her investment and any competitive advantage he or she may have vis-à-vis competitors.[26] In effect, the Internet opens a window of opportunity for piracy and private copying wider than it has ever been opened before. As transmission capacity expands, this window continues to open ever wider.

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[24] Burk, *supra* note 15, at 3.

[25] ACLU v. Reno, 929 F.Supp. at 831-832. The court goes on to explain that any realistic form of policing Internet communications is not technically feasible because "the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable." *Id.* at 831. Moreover, this technical hurtle to regulation is complicated by the fact "[m]essages between computers on the Internet do not necessarily travel entirely along the same path. The Internet uses 'packet switching' communication protocols that allow individual messages to be subdivided into smaller 'packets' that are then sent independently to the destination, and then are automatically reassembled by the receiving computer." *Id.* at 832.

[26] Brown *supra* note 17, at 17.

In addition to the proliferation of potential infringers and the decentralized structure of the distribution medium, copyright enforcement is further complicated by the international nature of the Internet and by the multiterritorial character of infringing acts.[27] Given the decentralized and international nature of the Internet, the threshold enforcement question is which national sovereign, if any, has jurisdiction over particular Internet communications and transactions.

> The Global Information Infrastructure (GII)...[makes] it more difficult to localize wrongdoing for purposes of criminal or civil litigation. The same lack of localization makes it difficult to enforce judgments of criminal and civil courts, and to organize civil discovery and tools of criminal investigation, such as search warrants and subpoenas. Conduct with potentially serious legal consequences is difficult for traditional sovereigns to control in the GII because it is ephemeral, invisible and crosses geographic boundaries easily.[28]

Even if the myriad of jurisdiction, venue, and choice of law questions can be settled, "[t]he real problem [becomes] turning a judgment supported by jurisdiction into meaningful economic relief" in multiple jurisdictions.[29]

As new technology made traditional copyright enforcement more difficult, copyright owners sought alternative methods to control the public dissemination of intellectual work product such as restrictive licensing agreements and technological

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[27] *See* Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 588 (1997) (Multiterritorials claim are defined as "claims involving acts or parties located in more than one country, but [that] do not necessarily require the application of a single law -- the forum's -- to resolve the entire claim."). *See also* Burk, *supra* note 15, at 5-6 ("[Intellectual property] statutes are territorial in nature; the computer networks is not.... Where the users and providers of software based services inhabit an electronic realm with virtual machines that transcend national borders, application of a territorial intellectual property scheme may be difficult and lead to unintended results.").

[28] Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 2 (1996).

[29] Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace*, 32 INT'L LAW. 1121, 1123 (1998).

protection measures.[30] Defenders of DMCA argue that legal protection of technological self-help is a critical adjunct to technological protection measures and the restrictive licenses they enforce because "the [true] barrier [to piracy and unauthorized copying] is legal, not technical or physical, because circumvention technology exists. What prevents the privileged use is that it is illegal to circumvent the barrier."[31] The theory is that "[l]egal protection of technological measures ... arguably [send] consumers back to an era in which technology was too rudimentary, cumbersome, or expensive to permit private copying to rival significantly the copyright owner's control of markets for the work."[32]

Clearly, there has always been piracy and private copying by individuals. It was not legal, but to a certain extent it was tolerated. It was tolerated because it happened on the fringes of the copyright owner's market. People could engage in private copying, but could not realistically redistribute those copes in large enough numbers to significantly affect the copyright owner's revenues. Large-scale piracy required some capital investment and the creation of a distribution system, both of which made pirates vulnerable to a copyright owner's enforcement action. In effect, the potential damage to the copyright owner's market was limited. In a digital environment, however, the fundamental difference is the potential scale of unauthorized copying and subsequent dissemination. There are few, if any,

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[30] *See generally* Julie E. Cohen, *Copyright and the Jurisprudence of Self Help*, 13 BERKLEY TECH L.J. 1089 (1998).

[31] Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 421 (1999).

[32] Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 154 (1999).

distribution bottlenecks on the Internet. Millions of potential consumers can literally take intellectual property and convert it to their own use at no real cost to themselves. In fact, many users simply do not "perceive that they are taking some thing from a copyright holder."[33] This is particularly true if the consumer merely reads the work of authorship off a computer screen and does not make additional copies of the work. Yet even this simple act, diminishes the value of the copyright if, at the very least, another entity such as a library or even another consumer has not initially purchased that copy.

The value of the copyright is also diminished if one person buys the copy and then simultaneously shares it with 1,000 other consumers. The one who illegally posts intellectual property on the Internet similarly faces no economic disincentive. In fact, he or she may not even be identifiable in some cases. Nothing is invested. Little knowledge is required to accomplish the task. The network is ubiquitous. Even without the complicating factor of international jurisdiction to cloud the issue, traditional enforcement methods have become extremely difficult and ineffective. As Professor Ginsburg explains: "if in the past low technology imposed a tolerance for widespread copying ... that state of affairs should not be confused with a legal right to engage in widespread convenience copying. Newer technology undermines the factual premise [underpinning this] tolerance..."[34] because it tips the balance between

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[33] Howard C. Anawalt, *Nine Guidelines and a Reflection on Internet Copyright Practice*, 22 DAYTON L. REV. 394, 407 (1997).

[34] Ginsburg *supra* note 32, at 154. *See also* Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFFALO L. REV. 845, 853 (1997) ("The low cost of distributing copies on the Internet makes mischievous or malicious piracy possible.").

property rights and public availability of information too far in favor of public availability.

DMCA attempted to rebalance the scales, but by absolutely prohibiting the circumvention of technological protection measures and the restrictive licensing agreements they enforce, it may have tipped the balance too far in favor of property rights instead. Mandating periodic rulemaking to determine if exemptions to the anti-circumvention prohibition are warranted was a step in the right direction.[35] However, the statutory authority granted the Librarian is too limited and the adversarial nature of traditional notice and comment rulemaking limit the potential what can be achieved in these proceedings.

B. THE CONTROVERSY.

Opinion is sharply divided about whether prohibitions against circumvention of technological protection measures in DMCA are consistent with the purposes of copyright law.[36] Copyright owners insist the availability of enforceable access controls on copyrighted digital works is nothing short of a precondition to the large-scale exploitation of works in electronic form. One scholar summarizes the prevailing sentiment among DMCA supporters as follows: "[i]f all kinds of works of

[35] 17 U.S.C. §§ 1201(a)(1)(C) & (D).

[36] Justice Stevens has described copyright as a tax that "restricts the dissemination of writings," but is quick to point out the framers allowed such restriction only to the extent necessary to encourage the production of broadly available literature and other arts. *See* New York Times Company, Inc. et al. v. Jonathan Tasini, et al., No. 00-201, 2001 U.S. LEXIS 4667, at *66 (June 25, 2001) (Stevens J., dissenting). Justice Stevens cites a 1970 article written by Justice Breyer in support of this proposition. *Id.* That article indicates the advantages of lead time and strategic pricing can give authors enough incentive to produce new works of authorship *see* Stephen Breyer, *The Uneasy Case for Copyright: A Study in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). While this may certainly have been the case in 1970, widely available public access to digital technology and the Internet has undermines Justice Breyer's proposition.

authorship, particularly those of intense creativity and imagination, are to embark willingly on the cyber-road, then authors require some assurance that the journey will not turn into a hijacking."[37] In effect, those in favor of DMCA prohibitions have concluded that preventing wholesale theft of digital works on the Internet not only requires copyright owners to encrypt their works, but that governments must also provide a strong deterrent against the almost certain widespread circumvention of these technical measures.

Opponents argue the increasing conversion of works into a digital format and the creation of new works solely in digital formats combined with technological protection measures will indiscriminately "lock up" works of authorship. This, they say, threatens not only the consumer's right to see and use information contained in copyrighted works, but in some cases could even preclude access to non-copyrightable material. Since both technical protection measures and circumvention technology exist, the essential issue is whether the law should protect the unfettered use of technology to control access to a work of authorship by indiscriminately restricting circumvention of all access controls. Critics argue this level of control over access to information goes far beyond what was ever envisioned by the framers of the Constitution and the Copyright Act. They contend that a legal prohibition on the act of circumvention itself allows copyright owners to "exercise factual control

[37] Ginsburg *supra* note 3, at 1467. *But see* Benkler supra note 31, at 423-24 (arguing that such an argument is specious since a vast array of works can already be found on the Internet; posted there by market-based organizations that derive revenue from advertising, access fees, tied products and self-advertising; and all of it made available before the effective date of DMCA prohibitions).

over what users can and cannot do with their works, as opposed to the mere right to control that copyright law provides for."[38]

1. PROTECTION OF ACCESS CONTROLS.

The provision at the center of this controversy is found in section 1201 of Title 17. Section 1201(a)(1)(A) makes it illegal for anyone to "circumvent a technological measure that effectively controls access to a work protected [by Title 17]." These technical protections, and the accompanying copyright management information[39] encoded in digital works "are [based] on the concept of 'trusted systems' or 'secure digital envelopes' that protect copyrighted content and allow access and subsequent copying only to the extent authorized by the copyright owner."[40] According to Professor Nimmer, this provision essentially prohibits "the equivalent to breaking into a castle--the invasion inside another's property is itself the offense."[41]

It is important to understand that section 1201(a)(1)(A) imposes strict liability "on the act of circumvention *per se*, not on the act of circumvention in order to

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[38] Kamiel J. Koelman, *A Hard Nut to Crack: The Protection of Technological Measures*, 22 E.I.P.R. 272 (2000). *See also* Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 DAYTON L. REV. 587, 601 (1997) (noting that copyright law does not give owners the right "to control, receiving, reading, viewing, listening to, and using works.")

[39] *See* 17 U.S.C. § 1202. Copyright Management Information is certain information conveyed with a copy or phonorecord. This information includes the title, name, or other information identifying the work, author, and copyright owner. Also included in the definition are any terms and conditions of use, and with the exception of public performances, names or other information identifying the performer, writer, and director of an audiovisual work. 17 U.S.C. § 1202(c).

[40] Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 162 (1997).

[41] David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 686 (2000).

infringe a protected right."[42] Therein lies the heart of the controversy. Significant concerns have been raised "that, in granting copyright owners a right to prevent circumvention of technological controls on 'access,' Congress may in effect have extended copyright to cover 'use' of works of authorship."[43] Congress itself was concerned about the impact this change in the law could have on the public availability of copyrighted works. This is why it directed the Librarian of Congress to conduct an administrative rulemaking every three years to study the issue and gave the Librarian the authority to grant exemptions to the *per se* prohibitions on circumvention of technological protection measures.[44]

Opponents of section 1201 protections believe that granting such broad control over the content of copyrighted works not only represents a fundamental change in the scope of copyright protection, but a dangerous one as well.

> Display, performance, and reproduction all concern the manner in which a copyrighted work is exploited. Allowing such actions without consent of the copyright owner would quickly diminish the value of the work.... Controlling access, on the other hand, moves from the realm of prohibiting exploitative uses into the realm of controlling audience behavior. Nothing in Section 106 of the Copyright Act allows copyright owners to control who hears a song being played or who views a movie being shown or who reads a copy of a book that has been made; it only allows the owner to restrict the person who plays the song, projects the movie, or makes the copy [for public dissemination].[45]

These critics do not oppose the notion that copyright owners should be paid for copies of their works. However, they do contend copyright owners are only entitled to control "the reproduction, distribution, and public dissemination" of the

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[42] Benkler *supra* note 31, at 415.

[43] Ginsburg *supra* note 32, at 143.

[44] *See infra* notes 131-157 and accompanying text.

[45] Schultz *supra* note 2, at 6.

actual copies.[46] As noted in the excerpt above, their objection is based on the perception that access controls allow copyright owners to extend control over the consumer's behavior, rather than just control the tangible copy of the work. This, critics say, means copyright owners can now "prohibit anyone from using materials protected by technological measures without permission, *even for a privileged purpose.*"[47] The underlying concern is that increased use of technical measures will effectively eliminate the fair use of copyrighted works for a large segment of the population, because as it currently reads, the law allows for fair use, but only if the consumer has authorized access to the work.[48] In other words, you can have fair use as long as you first pay for access. They argue this state of affairs undercuts the constitutionally sanctioned objective of fostering the broad public availability of works of authorship and the ideas contained therein. Moreover, this shift in power to copyright owners is also perceived as threatening consumer privacy and the exercise First Amendment rights.[49]

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[46] Litman, *supra* note 38, at 601. Implicit in this argument is that copyright owners can meaningfully address online infringement in the context of their established section 106 rights.

[47] Benkler *supra* note 31, at 419 (emphasis added).

[48] Fair use permits the use of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. In deciding whether "a use" is "fair use," courts must consider the purpose and character of the defendant's use, including whether the use is for a commercial or nonprofit purpose; the nature of the copyrighted work; the amount of the copyrighted work used and importance of the portion used to the work as a whole; and the effect on the potential market for the copyrighted work. 17 U.S.C. § 107.

[49] *See generally*, Julie E. Cohen, *The Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996) (describing similar concerns arising out of the use of copyright management information encoded on to digital works and protected against tampering by 17 U.S.C. § 1202). Similar concerns have been raised about still another feature of DMCA – the additional provisions that have come to be known as the "device" prohibitions. The ban in section 1201(a)(2) and (b) "targets not those who break into another's domain, but those who facilitate the process." Nimmer *supra* note 41, at 687. These provisions prohibit the manufacture, importation, or otherwise trafficking in technologies, products, services, or devices that fall into any of the following categories: those "primarily designed or produced for the purpose of circumventing a

Proponents on each side of the issue are suspicious of the other's motives and, therefore, have tended to take all or nothing positions. Copyright owners champion nothing less than a complete prohibition against circumvention, and the related prohibitions on circumvention devices, "because relying on legal enforcement of copyright is more cumbersome and porous than self help."[50] They argue the potential for instantaneous worldwide digital distribution of pirated works, makes anything less than full protection of technical self-help measures meaningless. Critics contend, however, that asserting control over access to digital works amounts to nothing more than a blatant attempt by the copyright industry to create a new revenue stream for copyrighted works; one which is, presumably, in excess of that needed as an incentive for authorship. Because digital distribution can "eliminate the most important bottlenecks at which copyright owners have traditionally placed their tollbooths--the movie theater, video store, broadcast licensee's studio, or the music store down the

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technological measure," 17 U.S.C. §§ 1201(a)(2)(A) and (b)(1)(A); those with "only limited commercially significant purpose or use other than to circumvent a technological measure," 17 U.S.C. §§ 1201(a)(2)(B) and (b)(1)(B); and those "marketed ... for use in circumventing a technological measure," 17 U.S.C. §§ 1201(a)(2)(C) and (b)(1)(C). In many ways, the arguments for and against the device provisions are similar to those stated above. Since most people cannot write computer code or manufacture devices that enable circumvention of technical protections, a ban on such devices can greatly limit the potential number of attacks against technical protections. Critics acknowledge that "Congress has historically dealt with perceived technological threats to copyright owners' rights by enacting narrow, targeted pieces of legislation," even including some prior to DMCA that have protected technological self-help measures. Cohen *supra* note 40, at 173. However prior legislation dealing with the incorporation of serial copy management technology in digital recording devices, 17 U.S.C. § 1002(c); the scrambling of cable television signals, 47 U.S.C. § 553(a)(2); and the encryption of satellite broadcasts, 47 U.S.C. § 605(e)(4) "address specific technologies that have few other markets and are unlikely to be deployed unintentionally." Cohen *supra* note 40, at 173 (1997) *citing* Thomas C. Vinje, *A Brave New World of Technological Protection Systems: Will There Still be Room for Copyright?*, 8 E.I.P.R. 431, 433 (1996). The current ban on anti-circumvention devices does differ from such legislation because "technologies that might be used for indisputably unlawful purposes are the same technologies that are useful for achieving many lawful and socially valuable ones." Cohen *supra* note 40, at 172.

[50] Benkler *supra* note 31, at 423.

street ... [access controls offer] copyright owners the hope that every single copy of their work will become its own tollbooth."[51]

While the use of technical access controls may be a relatively recent development, controlling access to works of authorship occurred before the advent of technological protection measures. For example, information about books available in book reviews, which can reduce a consumer's search costs and serves as an incentive for authors to write "better" books, could be reduced if reviewers had to pay every time they wanted to quote from a copyrighted work. On the other hand, there is no law that requires publishers to give reviewers free copies of books, although there is an industry custom of doing so. In a sense, this is a form of access control, which is separate and distinct from controls that limit copying. The reviewer must pay for a physical copy of the book in order to access the work, but the reviewer can quote small amounts of the work without paying a royalty.[52]

Additionally, the creation of a revenue stream from digital exploitation is not a bad idea so long as the maximization of profit does not inordinately restrict the fair use of works by consumers. In one sense, the development of a new revenue stream seems to be exactly what is needed. Access controls can help preserve revenues lost to Internet piracy and private copying. In a digital environment, the publication of a more easily pilfered online journal, for example, is also likely to supplant sales from

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[51] *Id.* at 422. *See generally* Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 566 (1998) ("The simplest pay-per-use systems offer encrypted documents for sale, or rather keys to those documents, one at a time ... More sophisticated ... systems employ methods such as steganography, micropayements, and imbedded applications to give information providers exact and continuous control over proprietary information.").

[52] I am grateful to Professor Schechter for this instructive example.

the sale of hard copy subscriptions to the same journal. Therefore, the loss of revenue from pilfered digital products supplants more than just the sales of the work's digital version. The same analogy applies equally to such industries as software development. Giving away one's product, by not protecting it, surely undercuts the incentive to produce new works. Therefore, "moving the tollbooth" by creating a distinct right to control access to the underlying work can be just as important to securing the "exclusive right" of authorship as Section 106 rights.[53] This does not mean the public's fair use must be entirely contingent upon the will of the copyright owner. That, after all, is not what "fair use" contemplates. However, the idea that any control over access to digital works is bad is just not tenable. Consumer's rights are still important, but in this particular instance, they become secondary to the preservation of the author's economic incentive to produce works of authorship.[54] As will be discussed in Part III, finding this balance is exactly what Congress sought to achieve with the mandate for periodic rulemaking to craft appropriate exemptions to the anti-circumvention prohibitions.

As both sides seek to advance their policy positions, they seem to miss the point that neither extreme presents a viable strategy for reconciling competing interests in a way that fosters creativity and dissemination of works of authorship. On the one hand complete, effective access controls over copyrighted works have the potential to radically reduce the availability of such works, and the information contained therein, for large segments of the population. Many people simply cannot,

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[53] Ginsburg *supra* note 3, at 1468.

[54] *Id.*

and will not, pay up every time they want to read the next chapter in an online book. Individuals and firms, which rely on access to information to produce new works, would also be negatively impacted. On the other hand, consumers must realize that few authors, playwrights, musicians, and software programmers can afford to work free. Encouraging the production of intellectual property in the modern world means the writers, composers, developers, and their investors must be able to expect a reasonable return for their efforts. Otherwise, the creative energy and capital needed to produce a wide range of intellectual property goods will be invested elsewhere.

As one scholar explains that "[t]he assumptions of copyright invoke reciprocity."[55] Authors and consumers each have certain rights in this equation. Neither constituency can exercise their rights to the complete exclusion of the other. "An author knows that he deserves compensation, but the author also knows that in exchange for his right to compensation the public is accorded access by fair use."[56] Even the fair use doctrine, so widely invoked by opponents of anti-circumvention legislation, "does not function to provide a general permission for wholesale copying."[57]

One of the primary concerns voiced by critics of traditional notice and comment rulemaking, like that used by the Librarian, is that it tends to become adversarial instead of fostering cooperative arrangements needed to preserve this kind of reciprocity. In part, this comes from the fact interested parties do not interact with

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[55] Anawalt *supra* note 33, at 401.

[56] *Id.*

[57] *Id.* at 399.

each other in a constructive way during the traditional rulemaking.[58] Each side just advocates positions to the governmental agency, which then decides he matter at hand. This is the case with the current rulemaking procedure used by the Librarian. Additionally, the Librarian's rulemaking is hampered by another fact. The parties have no real incentive to cooperate and achieve a consensus about an end state because the Librarian's only authority is to either grant, or not grant an exemption to the section 1201 prohibition.[59] Congress gave the Librarian too little authority to craft creative solutions and arrangements that could allay some of each side's concerns.[60]

2. ACCESS CONTROL RIGHTS AND THE SPECTER OF A PAY-PER-USE WORLD.

In a recent essay, Professor Ginsburg postulates that granting a right to control access is simply a logical extension of the current publication right. She argues that users no longer need to actually have a copy of a work in order to "experience" the content of a work. She concludes that "when the exploitation of works shifts from having copies to directly experiencing the content of the work, the author's ability to control access becomes crucial."[61] Her analysis is as follows:

> [W]hile digital media in one sense de-materializes copies ... recipients not only [can] perceive the works fleetingly in "real"

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[58] *See infra* note 185-191 and accompanying text.

[59] 17 U.S.C. §1201(a)(1)(C). *See also infra* notes 148-150 and the accompanying text for a discussion of the legislative history outlining the drafter's intent to limit the Librarian's authority to change the basic prohibitions.

[60] *See infra* note 252-255 and accompanying text for a discussion of a proposed statutory change needed to enable the negotiated rulemaking proposed in this thesis.

[61] Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 8 COLUMBIA LAW SCHOOL PUBLIC LAW WORKING PAPER 1, 3 (2000) *available at* <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=222493>.

> time, but they also [hold] the power to re-materialize them into retention copies.... *Every act of perception or of materialization of a digital copy requires prior access. And if the copyright owner can control access, she can condition how a user apprehends the work, and whether a user may make any further copy.* Access control can at the same time thus vastly increase the availability of copyrighted works in de-materialized form, yet constrain their susceptibility to conversion to physical copies.... *[W]e will no longer need hard copies to enjoy the work; indeed in a world of access conditioned on non retention of digital copies, we will be able to summon up the work at any time, but we may not be able to own a copy.*"[62]

Professor Ginsburg goes on to suggest "that, in a digital environment, the 'exclusive Right' that the Constitution authorizes Congress to secure to authors is not only a 'copy'-right, but [includes] an access right...."[63] Essentially, she says access rights give copyright owners the ability to license the reading, listening to, or viewing of a digital copy without having to completely surrender control over an actual copy to the consumer. By not completely surrendering control over any individual copy of the work, the potential for large-scale theft, primarily through private copying, can be reduced. At the same time, a reader or listener can still read the book or the play, listen to the music, or watch the movie. In the final analysis, she concludes that:

> without an access right, it is difficult to see how in a digital era authors can maintain the 'exclusive Right' to their 'Writings' that the Constitution authorizes Congress to 'secure.' Even if Congress might qualify the right's exclusivity by imposing a variety of compulsory licenses, or outright exemptions, it is surely one thing to introduce specific and narrow limitations in coverage, quite another to design a system that pervasively fails to afford meaningful exclusivity."[64]

In response to criticism that access rights will generally adversely affect average consumer by limiting a right to access information for free, Professor

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[62] *Id.* at 2 (emphasis added).

[63] *Id.* at 3.

[64] *Id.* at 9.

Ginsburg notes that, by making works more readily available on the Internet, an owner's right to control access may actually increase the availability of works because "[a]ccess controls make it possible to offer end-users a variety of distinctly-priced options for enjoyment of copyrighted works."[65] She reiterates, however, that such tailored distribution arrangements based on consumer demand "are likely only when copyright owners are confident that the 'experiencing' copy will not turn into an unauthorized 'having' copy, or worse yet, unauthorized sharing copies."[66] This discouragement of tailored distribution arrangements, by not promoting enforceable access controls would, in the end, "disserve consumers" because, as is the case now, all "end-users would continue to be charged for all uses, whatever the level in fact of their consumption."[67]

Despite supporting some form of enforceable access control right, Professor Ginsburg does acknowledge some significant drawbacks in the current scheme. Along with several other commentators, she warns that consumers could be forced to pay for each and every use of a copyrighted work. She explains that "[i]n adopting an 'access to the work' standard, Congress has placed the user who has lawfully stored a copy of an access-controlled work in the same position as a user who does not retain the copy, and who must therefore re-connect to the online source to view the work. Each viewing from the online source is a new 'access' to the work."[68]

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[65] *Id.* at 10.

[66] *Id.* at 4.

[67] *Id.* at 10.

[68] Ginsburg *supra* note 32, at 141.

Other critics contend that anti-circumvention legislation could even allow copyright owners to remove works entirely from the public domain by adding a thin veneer of copyrightable material to works already in the public domain, a practice referred to "thin copyright," and then encrypting the entire work.[69] Of course, traditional copyright protects only the new portions of this work or the selection, coordination, and arrangement of the underlying material. However, anyone who circumvents the encryption in order to access just the uncopyrighted portions of the work would still violate the anti-circumvention law.[70] Because enforcement of access rights is not contingent on a subsequent infringement, "the mere act of encoding a work ... would magically confer upon vendors greater rights against the general public than copyright allows."[71]

Even more worrisome is the possibility that free access to all types of information, music, and motion pictures, even those in the public domain, could effectively disappear because access controls allow a copyright owner to limit each reading, listening, or viewing of any work to those paying for access. Moreover, since access "means more than access to the copy, the publisher can now charge not only for acquisition of an electronic edition of Shakespeare (assume no copyrightable value added to the text of the plays), but for each reading of Much Ado, and readers

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[69] The term thin copyright refers to the practice of packaging material unprotected by copyright, such as U.S. government works, unoriginal listings, or matters in the public domain, with enough minimally original material or formatting to obtain a copyright on the new work. *See* Ginsburg *supra* note 61, at 12. *See also* 65 Fed. Reg. at 64576.

[70] 17 U.S.C. § 1201(a)(1)(A). *See also supra* note 42 and accompanying text.

[71] Cohen *supra* note 40, at 178.

who have lawfully acquired the copy may not elude the charges."[72] This development of a "pay-per-view" or a "pay-per-use" world encouraged by strict enforcement of access controls is depicted by some as a direct attack on the fundamental principles underlying the copyright law. Professor Julie Cohen argues the rights accorded by the Copyright Act are much more limited than those being pressed for by proponents of ironclad access controls:

> The Copyright Act *does not entitle copyright owners to control all uses of their copyrighted works*. Instead, it gives them the exclusive right to perform or authorize the six acts listed in section 106: reproduction, preparation of derivative works, distribution, performance, display, and (for sound recordings) digital performances. In addition the Act provides a number of exceptions to these exclusive rights for particular uses and/or users.... Moreover, many works that might be made available in digital form are wholly unprotected by copyright....[73]

In a "pay-per-use" world, the delicate balance between property rights and social benefit, which is played out in the copyright law, is upset. Unduly favoring property rights would allow copyright owners to effectively control the dissemination of "facts, ideas, or functional principles [which are] 'building blocks' for future works."[74]

At present, much of the debate focuses around the fate of the fair use doctrine.[75] Fair use essentially allows limited use of another's copyrighted work as long as such use is in the public interest and does not significantly dilute the value of copyright owner's property. The concern here is two-fold. As outlined above, the

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[72] Ginsburg *supra* note 32, at 147.

[73] Cohen *supra* note 40, at 175-76 (emphasis added).

[74] Cohen, *supra* note 30, at 1094. *See also* Pamela Samuelson, *Will the Copyright Office be Obsolete in the Twenty-First Century*, 13 CARDOZO ARTS & ENT. L. J. 55, 60 (1994).

[75] 17 U.S.C. § 107. For a more detailed definition of fair use *see supra* note 48.

mere fact a copyright owner "can condition how a user apprehends the work"[76] means that average consumers could effectively lose the ability to engage in fair use. "[T]echnological protection measures can unilaterally alter the range of uses under an owner's control, they can displace background law as the primary means of regulating access to information they protect. And, like other physical self-help measures, they can do so without reference to whether the use they regulate is permitted or prohibited by law."[77] Without an independent right to access information, it is possible the average information consumer could lose the ability to engage in fair use because he or she simply cannot get to the information without the consent of the copyright owner controlling access.

The second concern is more fundamental. "Even if copyright owners were willing [or required] to design their systems to allow for fair use, library copying, and the like,"[78] automated systems are simply be unable to perform the fact-specific inquiry required in fair use cases. In other words, fair use could be radically curtailed simply because the copyright owners' software automatically makes decision now left to people. There would be no reasoned analysis on a case-by-case basis unless the consumer was to negotiate with the copyright owner for access to engage in a fair use. Technological protection measures and anti-circumvention laws can simply take away all opportunity to use information without the copyright owner's consent.

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[76] Ginsburg *supra* note 61, at 2.

[77] Benkler *supra* note 31, at 414.

[78] Cohen *supra* note 40, at 177. *See also* Ginsburg *supra* note 61, at 11 ("[A]ccess controls may be ... too crude to accommodate a variety of non infringing uses, including reproduction of unprotected information contained within a copyrighted work, and 'transformative' fair uses, in which the second author seeks to create an independent work that comments or otherwise builds on its predecessor.").

Realistically, copyright owners would not be able to engage in such analysis either. They would likely be overwhelmed with requests. The courts would face a similar dilemma. It is, therefore, possible the strict liability attached to circumvention of technological protection measures could become nothing less than what has been called a statutory "disincentive to those wishing to exercise fair use rights."[79]

Opponents of the anti-circumvention law are quick to point out that such stringent protections are unnecessary. In recent years, for example, the software industry has been phenomenally successful despite the fact neither technological measures nor anti-circumvention legislation were used to protect much of the current mass-marketed software.[80] Further, some commentators argue that restrictions on the use of copyrighted material, and in particular on the fair use privilege, may actually hamper continued technological development. Ironically, software development, which can benefit from strict copyright enforcement, may be among the industries most seriously affected by the anti-circumvention law since laws restricting access to existing works can limit the ability of software developers to build upon the work of others.[81] In effect, technological protection measures protected by anti-circumvention laws can make the industry "re-invent the wheel" during software development.[82]

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[79] Cohen *supra* note 40, at 175.

[80] Samuelson *supra* note 5, at 439. *Accord* Benkler *supra* note 31, at 423 (the author notes that "[s]lippage is the rule, not the exception, in information goods. People share books, videos, or software as a matter of course ... whether privileged or not, people gain access to information all the time, and owners usually cannot prevent all access."). *See also* Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 21 (1997) (noting that "a staggering--almost unimaginable--quantity of intellectual property continues to be produced and made available on-line despite these threats.").

[81] Schultz *supra* note 2, at 8.

[82] Since the early 1980s courts have tried to balance protecting software from unauthorized copying with the industry's desire to copy existing code in order to develop more complex programs with less

This has led critics of anti-circumvention legislation to declare that "copyright owners cannot expect a digital future in which no unauthorized copies will be made. What they [should] expect ... is enough protection so that the leakage that occurs does not become a hemorrhage."[83]

Supporters of section 1201 counter that concerns about the elimination of fair use "may be alarmist."[84] In the first place, "creators generally want people to experience their works. Creators and investors alike depend on wide audiences of legitimate paying customers to support the creation and distribution of works."[85] Unduly restricting access to copyrighted works is simply bad for a mass-market business. The economic incentive drives authors and copyright owners to make their works available. In some cases, "technical measures can actually facilitate [fair use] through, for example, 'copy once' technology that allows consumers to make a single copy of the work."[86] Further, supporters contend "it is unlikely that technical protection measures will be applied to all formats."[87] Books and journals will not disappear soon and every online or digital product will not be locked behind

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errors and to enhance the interoperability of different programs. Currently, most courts follow a version of the test developed in Computer Associates International v. Altai, Inc., 982 F.2d 693 (2nd Cir. 1992) which limits the protection of an author's nonliteral expressions to those elements which are not dictated by efficiency or external factors and which do not include elements taken from the public domain. *See* Mark A. Lemley & David W. O'Brien, *Encouraging Software Reuse*, 49 STAN. L. REV. 255, 277-80 (1997). In a very real sense, the widespread use of, and legal defense of, technological protection measures may actually represent a step backward for the software industry which has struggled to accommodate two important, but competing interests. *See generally* Mark A. Lemley, *Convergence in the Law of Software Copyright?*, 10 HIGH TECH. L.J. 1 (1995).

[83] Samuelson *supra* note 5, at 439.

[84] Marks & Turnbull *supra* note 4, at 202.

[85] *Id.* at 199.

[86] *Id.* at 202.

[87] *Id.* at 199.

technological protection measures. In part, this is because such technical measures are inherently difficult to implement on a widespread basis since they must be developed in cooperation with consumer electronics manufactures that are generally reluctant to increase the cost of producing consumer electronics.[88]

Some supporters of anti-circumvention laws also believe the fair use doctrine has narrowed enough in recent years that imposition of access controls on copyrighted works is not inconsistent with the doctrine. For example, one commentator notes that "[c]urrent case law makes it harder for defendants to benefit from the fair use defense to the extent that plaintiffs make it easier to pay licensing fees."[89] In other words, the more amenable a copyright owner is to granting some form of license, the less weight tends to be accorded the consumers' right to engage in limited copying without providing compensation to the copyright owner. Recounting the decision in *American Geophysical Union v. Texaco, Inc.*[90] Professor Bell notes:

> [P]ublishers had, with the help of the Copyright Clearance Center, created a 'workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying.' This made it difficult for Texaco to claim that its unauthorized copying had no impact on revenue the plaintiffs might have earned from their copyrights.[91]

This same commentator goes on to note that later, in *Princeton University Press v. Michigan Document Services, Inc.*[92] the Sixth Circuit recognized that "[w]here...the copyright holder clearly does have an interest in exploiting a licensing

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[88] *Id.* at 200.

[89] Bell *supra* note 51, at 567.

[90] 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 116 S.Ct. 592 (1995).

[91] Bell *supra* note 51, at 568.

[92] 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 17 S.Ct. 1336 (1997).

market--and especially where the copyright holder has actually succeeded in doing so--'it is appropriate that potential licensing revenues for photocopying be considered in the fair use analysis.'"[93] He asserts the Courts' disinclination to sanction a fair use defense, when consumers have ready access to copyrighted works under a licensing scheme, means technological protection measures will "help to ensure that fair use will wither as the use of automated rights management grows."[94]

While the ability of a copyright owner to create and enforce a viable system of licensing is one factor in the fair use analysis, it may be premature to regard the existence of a licensing system as a conclusive factor. In both *Texaco* and *Princeton University Press*, the defendants were making use that was essentially in the primary market the copyright work was designed to serve and therefore, directly supplanting a copyright owner's sales.[95] The cases may have been decided differently, but for this fact.[96] Yet, as copyright owners gain the technical ability to tailor distribution to individual consumers, the more likely an individual's unauthorized copy of a work will actually supplant a direct sale, as was the case in these decisions.

Professor Ginsburg makes a similar point when she says, "'access' appears to resemble the traditional copyright concepts inherent in the exclusive distribution right. The Supreme Court has construed this right to *give authors control over the determination to grant 'access' to her work, that is, to disclose and offer it to the*

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[93] Bell *supra* note 51, at 570 *quoting* Princeton University Press, 99 F.3d at 1387.

[94] *Id.* at 571.

[95] For a critical look at industry loss figures *see infra* note 118.

[96] I am again grateful to Professor Schechter for this insight.

public, for purchase if she chooses."[97] She supports her theory by distinguishing the case for access controls from the decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*[98] She argues that unlike the facts in *Sony*, where television programs were being broadcast free of charge to anyone with a TV set, "if a document is available only through a commercial online service, then the public is *not* 'invited to [view it] ... free of charge,' and copying it even temporarily ... has a much weaker claim to being fair use. This is especially true if ... copying adversely affects the 'potential market for or value of the copyrighted work.'"[99]

Professor Bell contends that use of technical protections and DMCA merely enables copyright owners "to enforce contracts that define different or additional rights."[100] They say this has the potential to create "a new public bargain between consumers and copyright owners"[101] that can put "the power of the market in the service of consumer demand."[102]

> Copyrights ... commonly lose present value because, with the passage of time and their wider distribution, they prove increasingly vulnerable to uncompensated uses. Because it reduces such risks, [technical protection] tends to increase the

[97] Ginsburg *supra* note 32, at 139 (citing Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539 (1985) (emphasis added)).

[98] 464 U.S. 417 (1984).

[99] Ginsburg *supra* note 3, at 1479. *See also id.* at 1486-87. Even those who advocate the existence of a right to control access do not advocate elimination of a fair use defense. Rather proposals range from those of limited scope which would "continue to provide strong protection against unauthorized initial acquisition of a copy of a protected work, but allow for circumvention in order to engage in fair uses, one the copy has been lawfully acquired," *see* Ginsburg *supra* note 61, at 15-16 to proposals for inclusion of an "general purpose 'other legitimate purpose' provision." *See also* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKLEY TECH. L.J. 519, 546 (1999).

[100] Bell *supra* note 51, at 564.

[101] *Id.* at 561.

[102] *Id.* at 589.

> value of copyrights. But *although this windfall might initially accrue to copyright owners, competition among information providers would force access prices downward, toward the marginal costs of obtaining and distributing expressive works.*"[103]

He proposes that, what he has termed, "fared use" would actually be a better bargain for consumers than the one offered by the fair use doctrine. Since the use of access controls permits price discrimination, individual users can pay prices commensurate with their use. "All consumers of copyrighted works may now be paying for the fair use privileges of a few...."[104] Professor Bell explains his thesis in more detail as follows:

> Despite gross misconceptions to the contrary, fair use never comes for free. One way or another, consumers using conventional media must pay to browse magazines at newsstands, to photocopy and distribute newspaper stories for spontaneous classroom use, to search for quotes and type them into articles, and to otherwise avail themselves of the fair use doctrine ... It makes no difference that consumers pay licensing fees in cash whereas they pay fair use's transaction costs in lost opportunities.... [F]ared use offers a considerable likelihood of providing more and better verified, organized, and interlinked information, at less cost, than fair use does now.[105]

This takes us back to the need to continue along a path that encourages reciprocity between copyright owners and users. As technology has developed to provide new ways to disseminate works of authorship, so too must the business arrangements that sustain that process. Adapting the technical architecture that supports these arrangements is also important. A regulatory process that fails to encourage interaction by the parties to these arrangements is, therefore, of limited use.

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[103] *Id.* at 588 (emphasis added).

[104] Ginsburg *supra* note 61 at 13.

[105] Bell *supra* note 51, at 580-81.

Professor Nimmer writes that "[d]epending on how the future unfolds, concern about fair use in the digital environment could range from pointless to vital."[106] Much of the DMCA criticism raises valid concerns, but these dire predictions only become significant if one assumes works of authorship are primarily, or only, available in a digital format. The problem with this assumption is that, as the Librarian of Congress found, such a situation does not now exist.[107] Moreover, speculation about the future of specific technologies and business models are currently too imprecise to be useful in framing exceptions to the anti-circumvention laws.

In passing DMCA Congress was very concerned about maintaining an appropriate balance between property interests and the social benefits of fair use. Yet, Congress did not go far enough to address these concerns. Simply taking the issue out of the legislative process and mandating their consideration by a Federal agency does not necessarily encourage the interaction of interested parties. Moreover, restricting the Librarian's authority to just granting exemptions to a blanket prohibition inhibits the creative process and reconciliation the House Commerce Committee was trying to engender and may actually encourage an adversarial process.

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[106] Nimmer *supra* note 41, at 713.

[107] *See infra* notes 164-167 and accompanying text.

III. DMCA AND THE LIBRARIAN'S RULEMAKING.

With anti-circumvention legislation, Congress was attempting to protect the economic value of copyrighted works against digital piracy. It recognized that computer technology and networked communications have evolved to a point where traditional copyright law alone is insufficient to deter the large-scale theft of digital works. Yet, some members of Congress were also deeply concerned that DMCA would restrict online access to copyrighted works far too much. There was concern strictly enforced access controls would unduly limit the public availability of works of authorship and stifle fair use in the process. Of course, this would adversely affect the creativity and advancement of knowledge, which drive the market for electronic commerce and the broader economy. Understanding that technology and business models in electronic commerce will continue to evolve at a much faster rate than legislation, Congress chose to create a mechanism for balancing these competing interests as technology and business methods change.

Sections 1201(a)(1)(C) & (D) require the Librarian of Congress to engage in periodic rulemaking to determine whether exemptions to section 1201(a)(1)(A) prohibitions are needed to preserve the public's right to access copyrighted works in a manner consistent with fair use. Just as important, this process was also designed to provide Congress with a continuing source of information about the real impact of technological protection measures on the public availability of information.[108]

The current rulemaking process, however, itself fails to take into account the fact that regulating cyberspace is different than the regulation of other forms of

[108] For a discussion on the potential impact of developing copyright law on broader information policy in a digital environment *see* Litman, *supra* note 38, at 587.

human behavior. As Professor Lessig notes "something fundamental has changed: the role code plays in the protection of intellectual property has changed. Code can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace."[109] Regulating behavior in cyberspace is necessarily dependent on the technical capabilities and limitations of computer and communications technology.

> The software and hardware that make cyberspace what it is constitute a set of constraints on how you can behave. The substance of these constraints may vary, but they are experienced as conditions on your access to cyberspace In some places (online services such as AOL, for instance) you must enter a password before you gain access; in other places you can enter whether identified or not.... The code or software or architecture or protocols set these features they are features selected by code writers; they constrain some behavior by making other behavior possible, or impossible.[110]

Despite the need to deal with issues such as the technological architecture of the Internet, the rulemaking process in this case tended to focus almost exclusively on issues of legislative policy. Comment after comment, witness upon witness discussed the pros and cons of technical protection measures and the legislation protecting them. The rulemaking record consists, almost exclusively, of abstract discussions about the merits of providing a copyright incentive or a defense of the fair use doctrine. In essence, parties to the rulemaking merely sought to fight the legislative battle again rather than examine whether or not competing interests could be reconciled. Very little analysis of how the technology works and how devices and software might be developed to accommodate competing interests seems to have taken place.

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[109] LESSIG *supra* note 16, at 126. Professor Lessig describes "code" as the hardware and software that creates and regulates cyberspace. *See Id.* at 6.

[110] *Id.* at 89.

As noted earlier, Federal law authorizes the Librarian to use a negotiated rulemaking procedure, known as reg-neg, to bring together interested private parties and public officials to negotiate a consensus and then actually write the administrative regulation.[111] In the remainder of this thesis, I argue that adopting negotiated rulemaking to examine the appropriateness of exemptions to the anti-circumvention prohibitions may be a more effective way to achieve the congressional purposes of balancing copyright protection with fair use while providing Congress with accurate information regarding the impact of technological protection measures.

A. CONGRESSIONAL EXPECTATIONS.

The central feature of section 1201(a)(1) is a compromise.[112] A compromise that clearly expands the scope of protection available to digital works of authorship[113] yet is cognizant of the need to continually balance the "interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet."[114]

On the one hand, Congress saw that a new and different kind of protection was needed for copyrighted works in order to encourage the dissemination of movies, music, software, and literary works over the Internet.[115] Aside from compliance with

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[111] *See infra* note 207-250 and accompanying text.

[112] *See* 17 U.S.C. § 1201(a)(1)(C).

[113] S. REP. NO. 105-190, at 12 (1998) (noting that circumvention was not illegal before this Act). *See also* H.R. REP. NO. 105-551, pt. 2, at 24-25 (1998) (explaining that "paracopyright" remedies pursuant to the anti-circumvention provisions are separate from and cumulative to existing remedies under copyright law).

[114] H.R. REP. NO. 105-551, pt. 2, at 21.

[115] S. REP. NO. 105-190, at 8.

the WIPO treaties, Congress was motivated to pass tough anti-circumvention legislation by two factors.[116] The first was the ever-present specter of piracy.[117] During the legislative hearings, the Chairman of the Senate Judiciary Committee noted, that "American companies lose $18 to $20 billion every year due to international piracy of copyrighted works."[118] The House committees considering this legislation heard testimony along similar lines.[119]

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[116] Opponents of the current anti-circumvention prohibitions are quick to point out that the anti-circumvention prohibitions go beyond what is required by the WIPO treaties. *See e.g., WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearings on H.R. 2281 and H.R. 2280 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 105th Cong. 241 (1997) [hereinafter *House Judiciary Hearing*] (statement of Douglas Bennett, President, Earlham College) (Sections 1201 through 1204 go far beyond what is required by the WIPO treaties). *See also* Neil Weinstock Netanel, *From the Dead Sea Scrolls to the Digital Millennium; Recent Developments in Copyright Law*, 9 TEX. INTELL. PROP. L. J. 19, 20, (2000) (regulation of technology rather than acts of infringement enables copyright owners "to control access to content, not just uses of content as provided in the traditional copyright law."). *See generally* Samuelson *supra* note 5, at 409-415.

[117] The legislative history does not mention, what is arguably the more significant problem of, private copying as a justification for the legislation.

[118] *The Copyright Infringement Liability of On-Line and Internet Service Providers: Hearing on S. 1146 Before the Senate Committee on the Judiciary*, 105th Cong. 1 (1997) [hereinafter *Senate Judiciary Hearing*] (statement of Orrin G. Hatch, Chairman, Senate Committee on the Judiciary). *See also id.* at 9 (statement of Fritz Attaway, Senior Vice President and Washington General Counsel, Motion Picture Association of America) (this industry attributes losses of over $2 billion in sales each year to the pirating); *id.* at 19 (statement of Daniel F. Burton, Vice President, Novell, Inc.) (the commercial software industry estimates over $12 billion in lost sales due to pirates in the prior year). *But see* Electronic Freedom Foundation, *Intellectual Property Online: Patent, Trademark, Copyright Archive*, *available at* <http://www.eff.org/pub/Intellectual_property> (last modified Mar. 14, 2001) (indicating some consider the U.S. Trade Representative (USTR) statistics regarding theft of intellectual property rights in foreign markets, from which these figures are derived, as greatly exaggerating the software industry actually losses). The academic literature also questions the accuracy of industry figures. *See* Cohen *supra* note 30, at 1121 n.110, *citing,* David M. Hornik, *Combating Software Piracy: The Shoplifting Problem*, 7 HARV. J.L. & TECH. 377, 390 (1994) (indicating the practice of equating every pirated copy with a lost sale is unreliable enough that courts have turned to statistical analysis of sales trends to determine damages) and Professor William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 99 (1992) (noting that, since the 1980s, the U.S. government has accepted industry figures equating the loss to pirates with revenues of lost sales at full price, which discounts the likelihood purchasers of infringing goods may choose to forego the purchase rather than pay full price). *See also* Jessica Litman, *The Demonization of Piracy* (visited April 20, 2001) <http://www.law.wayne.edu/litman/papers/demon.pdf> (arguing record company figures equate "behavior that *could potentially cause the same effect* as piracy, even if it doesn't....") (emphasis original) and Jessica Litman, *Electronic Commerce and Free Speech*, Address at Yale Law School Information Society Project Conference on Private Censorship/Perfect Choice (April 10, 1999) at 8, *available at* <http:// http://papers.ssrn.com/sol3/papers.cfm?abstract_id=218275> (indicating the fear

The hearings brought home the realization that digital piracy of intellectual property is more easily accomplished and has a greater impact than other kinds of theft. In part, this is because a pirate of intellectual property enjoys an enormous competitive advantage over legitimate authors and developers. Content developers must make large investments of time, intellectual capital, and financial resources to bring their work to market. Digital pirates, however, face little cost to acquire copyrighted works and few, if any, distribution bottlenecks. Those who illegally post intellectual property on the Internet may, in fact, face no economic disincentive. Moreover, some pirates do not attempt to sell the copyrighted works, so they have no incentive to limit distribution in any way to maximize their own profits.[120]

In one telling example, a witness testifying before the House Subcommittee on Courts and Intellectual Property described the asymmetrical economic advantage enjoyed by pirates in stark contrast for the committee:

> The typical [entertainment] software title costs in excess of $1.5 million to develop, and takes on average 18 months to complete.... [while] a device called the Game Doctor, which I have with me today, is sold for $150, and is used by pirates to copy the [game] cartridge in a CD-ROM format ... this device, which has no purpose other than to bypass security systems, makes it possible to

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of massive piracy is misplaced because technological protection measures make unauthorized use difficult for all, but a few dedicated hackers; the real fear is obsolescence of current media). How the parties went about advocating their positions to Congress may have had an impact on the legislation. Industry representatives generally made their case with statistics and well-chosen anecdotes. Opponents of the anti-circumvention provisions were generally much more philosophical in their arguments. For example, academics and librarians discussed the need to preserve fair use and the potential impact section 1201 could have on the free flow of ideas. Yet, no one at the hearings seems to have forcefully questioned the validity of figures, or offered alternatives to those, provided the committees by industry trade associations, or those from the USTR, that were used by Congress to justify the need for section 1201 in its present form.

[119] *See House Judiciary Hearing supra* note 116, at 212 (statement of Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association) (this association estimates industry losses in the $10 billion market for entertainment software at $3 billion per year).

[120] *See* Meurer *supra* note 34, at 853.

> copy cartridges to floppy disks, and once the copy is on the disk, the program is easily duplicated and uploaded onto the Internet.[121]

It was clear to members of the various committees that this state of affairs is an increasingly one-sided contest, with the economic advantages always accruing to the pirate. Reading the committee hearings and floor debates one gets a sense that various Members of Congress saw the threat of digital piracy growing rapidly out of control. Their greatest concern seems to have been how easily and quickly this trend could undermine both domestic and international markets for copyrighted works. This would then undermine incentives underpinning American entrepreneurship in the very competitive copyright industries.[122] Moreover, the threat was only expected to grow worse as network communications get faster and are able to carry more data. Senator Leahy summarized the prevailing sentiment that the digital piracy would only get worse when he noted: "[c]omputers will change, technology will change, and the

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[121] *House Judiciary Hearing supra* note 116, at 212. (statement of Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association); *see also id.* at 224-25 (statement of Thomas Ryan, Chief Executive Officer, SciTech Software, Inc.) (this executive produced a list of piracy tools directed against his company's software products that was about one inch think and contained one web site offering downloads of about 600 different pirate tools after a "quick search of the Internet"). *See also The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcommittee of Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce*, 105th Cong. 36 (1998) [hereinafter *House Commerce Committee*] (statement of Robert Holleyman, Chief Executive Officer, Business Software Alliance) (software piracy costs $13 billion per year and the majority of those losses come from U.S. companies); *id.* at 96 (statement of Hilary Rosen, President, Recording Industry Association of America) ("[a] 25 year old sitting in [his] home can have the economic impact of the pirate in the manufacturing plant in China by virtue of the Internet).

[122] *See e.g.*, 144 CONG. REC. S4884, S4894 (1998) (statement of Senator Durbin) ("Mr. President, many good reasons have been stated on the floor for the passage of this important legislation. I hold in my hand convincing evidence. It is an unsolicited e-mail sent to my Senate computer a few weeks ago. It boasts that they will offer for me to purchase 500 different bootleg video games from a person who says in the solicitation, '[a]ll the games I sell are pirated. I do not sell originals.' This business is operating across the United States, Canada, England, Australia, and claims to trade copies made in Hong Kong."). *See also Senate Judiciary Hearing supra* note 118, at 1 (statement of Orrin G. Hatch, Chairman, Senate Committee on the Judiciary) ("Unless this illegal activity is eliminated, or at least substantially minimized, American creators and businesses will be denied the reward for their labors, which is an indispensable incentive to continue the level of creativity and entrepreneurship that the United States currently enjoys.").

delivery systems will improve. And, then, we've got a real problem and it is better that we address it today than after the fact."[123]

Congressional concern was heightened by the fact copyright industries significantly contribute to the overall U.S. economy. As the Senate Judiciary Committee outlined:

> The copyright industries are one of America's largest and fastest growing economic assets. According to International Intellectual Property Alliance statistics, in 1996 (when the last full set of figures was available), the U.S. creative industries accounted for 3.56 percent of the U.S. gross domestic product (GDP)–$278.4 billion. In the last 20 years (1977-1996), the U.S. copyright industries' share of GDP grew more than twice as fast as the remainder of the economy–5.5 percent vs. 2.6 percent. Between 1977 and 1996, employment in the U.S. copyright industries more than doubled to 3.5 million workers–2.8 percent of total U.S. employment. Between 1977 and 1996 U.S. copyright industry employment grew nearly three times as fast as the annual rate of the economy as a whole–4.6 percent vs. 1.6 percent. In fact, *the copyright industries contribute more to the U.S. economy and employ more workers than any single manufacturing sector, including chemicals, industrial equipment, electronics, food processing, textiles and apparel, and aircraft. More significantly for the WIPO treaties, in 1996 U.S. copyright industries achieved foreign sales and exports of $60.18 billion, for the first time leasing all major industry sectors, including agriculture, automobiles and auto parts, and the aircraft industry.*[124]

The sheer size of this economic sector alone demanded a significant response to the piracy threat. Some opined that, as the leading producer of intellectual property in the world, the United States also had the most to gain from increasing the level of protection for copyrighted work.[125] By taking a hard line with pirates and purveyors

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[123] *Senate Judiciary Hearing supra* note 118, at 5 (statement of Patrick J. Leahy, Member, Senate Committee on the Judiciary).

[124] S. REP. NO. 105-190, at 10 (emphasis added).

[125] *See House Judiciary Hearing supra* note 116, at 34 (statement of Commissioner Bruce Lehman, Assistant Secretary and Commissioner of Patents and Trademarks). *See also* 144 CONG. REC. S4884, S4893 (1998) (statement of Senator Thompson).

of pirating tools, Congress hoped to protect a large and dynamic part of the economy and the U.S. balance of payments.

The second factor motivating Congress only served to highlight the vulnerability copyright owners and producers faced. This was the pervasive reach of Internet itself.[126] The House Judiciary Committee found that "at a time when borderless digital means of dissemination are becoming increasingly popular ... rapid dissemination of perfect copies ... will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property."[127] Citing "the ease with which digital works can be copied and distributed worldwide virtually instantaneously," the Senate Judiciary Committee concluded "copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."[128]

More than anything else it was this evolution in electronic media technology that makes protected intellectual property easy to obtain and disseminate which seems to have spurred large majorities in both houses of Congress to make circumvention of technological protection measures illegal. The floor debates give a sense that

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[126] One recent article explains the explosive growth the Internet has enjoyed in recent years thus:

> In 1992, there were fifty Web servers ... worldwide. In 1993, the first two graphical browsers, Mosaic and Netscape were introduced. By 1995, the number of Web servers has increased to approximately 73, 500. The number of users in 1995 estimated at twenty-six million had increased dramatically to an estimated 275 million in February of 2000.

Gretchen McCord Hoffmann, Note, *The Need for Statutory Solutions to the Problem Presented by RAM Copies*, 9 TEX. INTELL. PROP. L. J. 97, 102 (2000).

[127] H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

[128] S. REP. NO. 105-190, at 8.

Members of Congress felt they had to do something to stop, what can be described as, the raiding of American creativity.[129] In a lot of ways, the argument in favor of section 1201 has the same emotional appeal as those made whenever a country tries to come to grips, with what some call, a "brain drain." Only here, it is not the best and brightest minds that are lured away to work in another country. Here, the best and brightest are hard at work in America while the fruits of their labor are stolen with a click of a mouse. After all, the stated purpose of anti-circumvention legislation was "to make digital networks safe places to disseminate and exploit copyrighted works."[130]

On the other hand, Congress was not ready to swing the pendulum of copyright protection entirely to the side of the copyright owners.[131] Copyright industries are successful and contribute to the broader economy precisely because the copyright incentive is a balance between the competing priorities of incentives to creators and the dissemination of knowledge and ideas.[132] Above all, Congress, and

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[129] For a more cynical, but no less accurate, perspective *see supra* note 51 and accompanying test.

[130] S. REP. NO. 105-190, at 2. *See also* H.R. REP. NO. 105-551, pt. 1, at 9. *But see supra* note 118 voicing skepticism over industry figures depicting levels of piracy.

[131] Despite the fact S. 2037 and H.R. 2281 embodied significant compromises on issues of service provider liability, library browsing, reverse engineering, encryption research, and the "no mandate" provision for consumer electronics designs, which were unanimously endorsed by the Senate and House Judiciary Committees, the House Commerce Committee found the bills "faced significant opposition from many private and public sector interests, including libraries, institutions of higher learning, consumer electronics and computer product manufacturers, and others with a vital stake in the growth of electronic commerce and the Internet." H.R. REP. NO. 105-551, pt. 2, at 21-22. *See generally* Benkler *supra* note 31, at 419 and Litman *supra* note 38, at 601. *See also infra* note 171 and accompanying text indicating the Register of Copyright's concern after the rulemaking that Congress may not have fully considered the impact of access control measures on the ability to engage in privileged use of copyrighted material.

[132] *See* H.R. REP. NO. 105-551, pt. 2, at 25 ("[C]opyright law for centuries has sought to ensure that authors reap the rewards of their efforts and, at the same time, advance human knowledge through education and access to society's storehouse of knowledge....").

in particular the House Commerce Committee, was concerned with preserving that balance. As Congressman Tauzin noted at the start of his subcommittee's hearings, "[i]f this bill favors the copyright community, consumers, manufacturers, users of copyrighted work and the society as a whole may in fact suffer. Similarly, if the bill naturally favors the users of copyrighted work, then creativity might be stilled in some respect."[133]

The Committee realized that in an environment where rapid technological change in the information technology and telecommunications industries is the norm, "new laws and regulations [would] have a profound impact on the growth of electronic commerce and the Internet."[134] Explicitly recognized was the fact this legislation was "about much more than intellectual property."[135] The Committee knew the legislation would affect "not only copyright owners in the marketplace for electronic commerce, but also consumers, manufacturers, distributors, libraries, educators, and on-line service providers.... It [would define] whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce."[136] Indeed, Members of the Congress postulated that "many of these rules [could] determine the extent to which electronic commerce realizes its potential."[137]

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[133] *See House Commerce Hearing supra* note 121, at 2 (statement of W. J. Billy Tauzin, Chairman, House Subcommittee on Courts and Intellectual Property).

[134] H.R. REP. NO. 105-551, pt. 2, at 21.

[135] H.R. REP. NO. 105-551, pt. 2, at 22.

[136] H.R. REP. NO. 105-551, pt. 2, at 22.

[137] H.R. REP. NO. 105-551, pt. 2, at 22. *See also* S. REP. NO. 105-190, at 65.

Congress also implicitly understood there is a symbiotic relationship between electronic commerce and intellectual property. The Commerce Committee saw that "[a] thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property–whether in the form of software, music, movies, literature, or other works–drives the demand for a more flexible and efficient electronic marketplace."[138] Senator Leahy echoed this conclusion in comments appended to the Judiciary Committee's report. Quoting the 1995 report on Intellectual Property Rights and the National Information Infrastructure (NII), he warned:

> [T]he public will not use the services available on the NII *and generate the market necessary for its success* unless a wide variety of works are available under equitable and reasonable terms and conditions, and the integrity of those works is assured. All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is no content.[139]

Yet, the Senate Judiciary Committee acknowledged that, in many ways, we do not fully understand the dynamics of this relationship between the availability of intellectual property, in particular copyrighted works, and electronic commerce.[140] More importantly, however, it acknowledged the fact we do not fully understand what conditions make that relationship, and its constituent parts, thrive. At some point, the

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[138] H.R. Rep. No. 105-551, pt. 2, at 23.

[139] S. Rep. No. 105-190, at 66 (emphasis added).

[140] This seems to have been the primary motivating factor behind requiring the Secretary of Commerce to "more precisely define the relationship between intellectual property and electronic commerce, and to understand the practical implications of this relationship on the development of technology to be used in promoting electronic commerce." H.R. Rep. No. 105-551, pt. 2, at 23.

economic incentive given copyright owners begins to restrict the availability of content "under equitable and reasonable terms and conditions."[141] That, in itself, can do as much damage to electronic commerce, and to the broader economy, as a lack of adequate protection for copyright owners; for too expansive a benefit for copyright owners can "dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and other wise make fair use of them."[142] In a sense, excessive restriction on the availability of copyrighted works is like hiding the building blocks of the modern economy.[143]

The Commerce Committee explains their balancing of interests in the resulting legislation as follows:

> The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a "pay-per-use" society. At the same time, however, the Committee was mindful of the need to honor the United States' commitment to effectively implement the two WIPO treaties, as well as the fact that fair use principles should not be extended beyond their current formulation .... The Committee has endeavored to specify ... how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users. The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law.[144]

As Congress recognized, the trick is preserving enough of an incentive to foster that equilibrium of supply and demand in copyrighted materials. Essentially this calls for creating an artificial level of scarcity in the availability of copyrighted materials,

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[141] S. REP. NO. 105-190, at 66.

[142] H.R. REP. NO. 105-551, pt. 2, at 26.

[143] Cohen *supra* note 30, at 1094.

[144] H.R. REP. NO. 105-551, pt. 2, at 26.

while at the same time, insuring "access for lawful purposes is not unjustifiably diminished."[145] The most important legal doctrine supporting this latter objective is, of course, fair use.

Knowing there can be no one answer that will keep competing interests in balance as technology and business methods developed, what Congress did is take one step back.[146] It created a mechanism that provides needed protections for copyright owners, but still allows the government to monitor the developing market for copyrighted materials in electronic commerce and then adjust the incentives as technology and business practices develop. Here the Commerce Committee departed from just proposing a flat prohibition against circumvention as did the bills endorsed in the Senate and House Judiciary Committees. The Commerce Committee proposed what it called a "fail-safe" mechanism. By converting "the statutory prohibition against the act of circumvention into a regulation, and [creating] a rulemaking proceeding in which ... enforcement of the regulation [can] be temporarily waived with regard to particular categories of works ... *on the basis of real marketplace developments*"[147] the Committee attempted to institutionalize this balancing mechanism. In a sense, the House tried to adapt the traditional case-by-case analysis used by courts applying the fair use doctrine to this new regulatory process. Essentially, the Commerce Committee created a feedback loop where the effects of

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[145] H.R. REP. NO. 105-551, pt. 2, at 36.

[146] As Congress begins to take up potential amendments to the DMCA one commentator has noted: "Congress may need to sit back on its heels and see how many of [the DMCA] cases play out. Otherwise, it's a constant cat-and-mouse game. The changes in software and hardware come so rapidly that it's hard for Congress to step in and do something about it." Adriel Bettelheim, *Congress Steps into Class of Copyrights, Consumer Rights*, CQ WEEKLY, March 31, 2001 at 715.

[147] H.R. REP. NO. 105-551, pt. 2, at 36 (emphasis added).

the new restrictions on the dissemination of ideas could be evaluated by the government, copyright industries, other businesses and the public in a continuing, considered manner. Then, tailored exceptions to the blanket prohibition, based on evidence of adverse impact rather than speculation, could be implemented or adjusted as needed on a three-year cycle.

It is important to realize that with this provision, Congress did not intent to eviscerate the anti-circumvention prohibitions it considered so important. The legislative history of this provision recognized that it "could be appropriate to modify the flat prohibition against the circumvention" if the market developed in such a way as to diminish rather than expand access "to copyrighted materials ... important to education, scholarship, and other socially vital endeavors."[148] However, it is clear the Committee did not intend to empower the rulemaking authority to make any substantive changes to the underlying provision during the rulemaking process; requiring the ensuing regulation to "conform in every particular to the provisions of the statute"[149] and prohibiting any "additional definitions, limitations, defenses or other provisions."[150] In other words, the Congress seems to have been satisfied that

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[148] H.R. REP. NO. 105-551, pt. 2, at 36.

[149] H.R. REP. NO. 105-551, pt. 2, at 36.

[150] H.R. REP. NO. 105-551, pt. 2, at 36-37. While the Secretary of Commerce was first delegated the rulemaking authority, the Conference Committee chose to vest rulemaking authority in the Librarian of Congress with the intent the Register of Copyrights conduct the rulemaking. *See* H.R. CONF. REP. NO. 105-796, at 64 (1998). According to one commentator, "[t]he problem arose because of a jurisdictional squabble between the Commerce and Judiciary Committees in each chamber. The logical entities for a rulemaking of this sort would be the Patent and Trademark Office or the National Telecommunications and Information Administration. These agencies, however, reside in the Department of Commerce, and the Judiciary Committees in the House and Senate feared that granting rulemaking authority to the Department of Commerce would lessen the Judiciary Committees' claim to primary jurisdiction over this issue. Placing the rulemaking under the Librarian of Congress avoids this jurisdictional problem." Jonathan Band & Taro Issihiki, *The New Anti-Circumvention Provisions in the Copyright Act: A Flawed First Step*, 3 NO. 11 CYBERSPACE LAW. 2 (1999).

the basic public policy inherent in the anti-circumvention provisions was sound. It was willing to make exceptions for those parties, who could prove (every three years), that the new restrictions were more detrimental to other important interests than was intended. But the default position was blanket enforcement of the anti-circumvention provisions.

The mechanism was designed to meet two goals. The first was to "assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, [diminishes] the ability of individuals to use these works in ways that are otherwise lawful."[151] Essentially, Congress sought to provide some breathing room for individuals and firms adversely affected by the advent of new restrictions. The second goal was the creation of a means to continually gather information about the evolving relationship between electronic commerce and intellectual property.[152]

> As electronic commerce and the laws governing intellectual (especially copyright laws) property change, the relationship between them may change as well. To ensure that Congress continues to enact policies that promote both of the above goals, it is important to have current information about the effects of these changes.[153]

By requiring a *de novo* review,[154] every three years,[155] and the consideration "of past or likely adverse impacts,"[156] while maintaining a "focus on distinct,

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[151] H.R. REP. NO. 105-551, pt. 2, at 37.

[152] *See supra* notes 134-145 and accompanying text.

[153] H.R. REP. NO. 105-551, pt. 2, at 23.

[154] H.R. REP. NO. 105-551, pt. 2, at 37

[155] 17 U.S.C. § 1201(a)(1)(C).

[156] H.R. REP. NO. 105-551, pt. 2, at 37.

verifiable and measurable impacts" the Committee sought to institutionalize an ongoing analysis about the proper scope of technological protection measures. In essence, what Congress wanted was to create a mechanism, which was more flexible and responsive than legislation, and which could be used to readjust the balance between copyright protection and fair use as needed.[157] Unfortunately, what it got from the traditional notice-and-comment rulemaking process falls far short of the mark.

B. THE LIBRARIAN'S RULEMAKING.

The Librarian of Congress promulgated two initial exemptions to the anti-circumvention provisions in section 1201(a)(1) on October 27, 2000.[158] The first exemption "consisting of lists of web sites blocked by filtering software applications"[159] and the second consisting of "literary works including computer programs and databases, protected by access control measures that fail to permit access because of malfunction, damage or obsolescence."[160]

As noted earlier, the primary purpose of this rulemaking process was to determine if the use of technological protection measures in the marketplace have

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[157] H.R. REP. NO. 105-551, pt. 2, at 36. Similarly Congress acknowledged that actual development of technological protection measures was itself a consultative process involving, "content owners, and makers of computers, consumer electronics and telecommunications devices." The Commerce Committee called this approach both constructive and positive and clearly expected it to continue. In fact, the Commerce Committee embraced this approach to such an extent that it deemed the circumvention of technological protection measures developed outside this consultative process lawful. H.R. CONF. REP. NO. 105-796, at 64-65.

[158] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64556 (October 27, 2000) (to be codified at 37 C.F.R. pt. 201).

[159] 65 Fed. Reg. at 64574.

[160] *Id.*

"diminished the ability of individuals to use copyrighted works in ways that are otherwise lawful."[161] To accomplish this goal, the Librarian canvassed a broad range of opinions from "copyright owners, educational institutions, libraries, and archives, scholars, researchers, and members of the public."[162] Despite an exhaustive, yearlong inquiry,[163] the Librarian found little indication of actual or likely adverse impact on the public's access to copyrighted works caused by technological protection measures.[164]

The Librarian acknowledged that evidence presented by exemption proponents was, in large part, speculative because prohibitions against circumvention were not even in effect while the rulemaking was in progress.[165] Yet, technological protection measures were clearly being used by the entertainment industry.[166] Despite this use of technological protection measures the Librarian noted "[w]itnesses who assert the need to circumvent access control measures were unable to cite an actual cases in which they or others had circumvented access controls despite the fact that such circumvention [was not] unlawful [at the time]."[167]

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[161] H.R. REP. NO. 105-551, pt. 2, at 37.

[162] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 64 Fed. Reg. 66139 (November 24, 1999).

[163] *See* Final Rule, at 64557 (392 public comments were received and 34 witnesses representing over 50 different interest groups testified during five days of hearings).

[164] *Id.* at 64562.

[165] *Id.* at 64562-63.

[166] *See* Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d. 294 (S.D.N.Y. 2000).

[167] Final Rule, at 64563. *See* The Register noted that more comments were received regarding DVDs than on any other subject in the rulemaking. *Id.* at 64567.

The rule has been attacked as "a disappointing decision ... that threatens to advance the narrow interests of copyright owners over the broader public interest of information consumers."[168] Others contend the Librarian "dismissed the public outcry, not because it lacked merit, but because [it] simply gave the industry [position] more weight."[169] Industry spokespersons, while commending the narrowly crafted exceptions, argued they should apply "only in limited situations, such as when the company that developed that product has gone out of business and can no longer correct any malfunctions in the technological protection."[170] Even the Register of Copyrights, who actually conducted the rulemaking for the Librarian, was dissatisfied with the record developed in regarding the effects of technological protection measures.

> The merger of technological measures that protect access and copying does not appear to have been anticipated by Congress....
>
> At present, on the current record, it would be imprudent to venture too far on this issue in the absence of congressional guidance. The issue of merged access and use measures may become a significant problem. The Copyright Office intends to monitor this issue during the next three years and hopes to have the benefit of a clearer record and guidance from Congress at the time of the next rulemaking proceeding.[171]

In some ways, this result is not completely unexpected. First, as noted above, the effect of technological protections and the anti-circumvention prohibitions will

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[168] Press Release, Representative Rick Boucher, "Pay-Per-Use" Society One Step Closer (Oct. 26, 2000), *at* <http://www.house.gov/boucher/docs/payperuse.htm>.

[169] 2600 News, *DMCA: Now a Whole Lot Worse*, 2600 Magazine (Oct. 31, 2000), *at* <http://www.2600.com/news/2000/1031.html>.

[170] Press Release, Business Software Alliance, Business Software Alliance Comments on DMCA Anti-Circumvention Rulemaking (Oct. 27, 2000), *at* <http://www.bsa.org/usa/press/newsreleases/2000-10-31.phtml>.

[171] *Testimony Before the Subcommittee on Courts, the Internet, and Intellectual Property, House Committee on the Judiciary*, 107th Cong. ___ (2001) (statement of Marybeth Peters, Register of Copyrights), *at* <http://lcweb.loc.gov/copyright/docs/regstat5201.html>.

become apparent only after their use becomes widespread. However, the passage of time alone will not guarantee the development of a more robust rulemaking record.

The initial rulemaking recently conducted by the Librarian under this provision provides Congress with little concrete information about the actual or likely impacts of technological protection measures. In part, this is because the traditional notice and comment rulemaking procedure used by the Librarian tends to be an adversarial process where interested parties advocate policy changes to a government agency rather than assist in the development of practical regulations. Critics of traditional notice and comment rulemaking contend the deficiencies of this process tend to deprive the rulemaking authority of needed information and inhibit creative solutions, which could obviate the need for further legislation. Additionally, the scope of the Librarian's authority to merely promulgate exemptions is too narrow to accomplish the meaningful compromises that would better effectuate the congressional mandate.

This thesis does not advocate turning the rulemaking procedure into a meeting of technologists, but a rulemaking process which does not bring together those who design the hardware and software that makes up cyberspace, the content owners who sell copyrighted material, and consumers seems doomed to accomplish little else but collect anecdotes and position papers. The next section explores some of the reasons the rulemaking procedure used may have contributed to the rulemaking's failure to develop more than a record of abstract positions.

C. THE LIMITS OF TRADITIONAL RULEMAKING PROCEDURES.

When authorized by Congress, federal administrative agencies can write regulations which "have effects that are functionally indistinguishable from those of statutes."[172] Because a bureaucratic agency, rather than a body of elected representatives, promulgates such regulations, the Administrative Procedure Act (APA)[173] and judicial doctrine impose both procedural and substantive requirements on the rulemaking process to preserve openness in government and safeguard the public interest.[174] The APA requires any agency issuing regulations use one of the following methods to issue rules:

> The first procedure, referred to as informal rulemaking, requires: (1) the issuance of a notice of proposed rulemaking; (2) the provision of an opportunity for submission of comments by interested members of the public; and (3) the issuance of the rule, incorporating a concise, general statement of its basis and purpose. The second procedure, referred to as formal rulemaking, is identical to the first with one critical exception: the agency must provide an opportunity for an oral evidentiary hearing instead of an opportunity to submit written comments.[175]

These procedural safeguards are complimented by a judicially imposed requirement that any rules embody "adequately reasoned decisions" by the agency.[176]

Of course, determining if the substance of a ruling by a federal agency is adequately reasoned is no small matter. It requires courts to do more than insure all

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[172] Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185, 186 (1996).

[173] 5 U.S.C. §§ 551-559, 701-706.

[174] Aside from the APA, the Federal Advisory Committee Act, 5 U.S.C. app. § 1, and the Government in the Sunshine Act, 5 U.S.C. § 552b, require the government to ensure balance in any advisory committees and to make decisions in public view. *See generally* Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensus Rules*, 32 AM. U. L. REV. 471, 474 (1983).

[175] Pierce *supra* note 172, at 186-87.

interested parties had an adequate opportunity to present their views during the rulemaking process. Fundamentally, it requires a court to step into the shoes of the agency and delve into the reasons underlying policy decisions. The court must then determine if, in its own estimation, those policy decisions are "adequately reasoned" or "arbitrary and capricious." To accomplish this exhaustive comparison

> courts must take a hard look at the administrative record and the agency's explanatory material to determine whether the agency used the correct analytical methodology, applied the proper criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical propositions.[177]

Backed by what came to be known as the "hard look" doctrine, federal courts can and do inquire into the rationale behind agency actions to determine if they are arbitrary and capricious. To facilitate judicial review, federal agencies are required to support rulemaking efforts with very elaborate records.[178] To avoid being declared arbitrary and capricious an agency regulation must not rely on factors Congress did not intend it to consider or fail to consider important aspects of the issue at hand. Moreover, the agency must explain decisions that run counter to available evidence or that could be considered implausible.[179] Some courts have also held rules to be arbitrary and

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[176] Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

[177] Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 527 (1997). Professor McGarity explains that the "hard look" doctrine, which had its genesis in a case called Pikes Peak Broadcasting Co. v. FCC, 422 F.2d 671, 682 (D.C. Cir. 1969), was originally how courts characterized the level of attention an agency was expected to give the positions of the various parties before it in an rulemaking procedure. In later years, the Supreme Court used the same metaphor to describe the intensity of judicial review when testing an agency ruling under the arbitrary and capricious standard. *Id.* at 527 n.5 *citing* Marsh v. Oregon Natural resources Council, 490 U.S. 360, 374-78 (1989).

[178] Seidenfeld *supra* note 176, at 533.

[179] McGarity *supra* note 177 at 540 (citing Motor Vehicles Mfrs. Assn of the U.S. v. State Farm Mut. Ins. Co., 463 U.S. 29, 42 (1983)).

capricious "unless the agency responded adequately to *all* well-supported objections, criticisms, and alternatives contained in the comments submitted in response to an agency's notice of proposed rulemaking."[180] These same courts have required agencies supplement already voluminous records "with the transcript of an oral examination hearing in which the agency and interested parties presented testimony, subject to cross-examination, on the most important and controversial issues raised in the proceeding."[181] This forces agencies to engage in "something called 'hybrid rulemaking' in which the agency combine[s] the features of the informal rulemaking process with many of the features of a formal adjudication."[182]

One significant result of this process has been the development of "a powerful incentive [for interested parties] to submit voluminous comments that include multiple objections, criticisms, and proposed alternatives, each supported by lengthy studies and arguments."[183] Scholars and commentators point out this tends to turn the rulemaking process into an adversarial process where participants advocate positions rather than develop deliberate, workable policy. Additionally, because comments from interested persons are received directly by the agency in written form,[184] the

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[180] Pierce *supra* note 172, at 192 *citing* Mobile Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1250 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 501 (4th Cir. 1973); and Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971) (emphasis added). Professor Pierce notes that while the Supreme Court has limited the discretion of lower courts to conduct an open-ended "hard look" review of agency rules, the judicial doctrine remains intact. *Id.* at 196.

[181] Pierce *supra* note 172, at 193.

[182] *Id.* For a critical look at the effectiveness of adjudicatory proceedings under the Administrative Procedure Act *see Id.* at 187-88.

[183] *Id.* at 192-93.

[184] WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 40[A] (3d ed. 1997).

mechanics of the process makes it inherently difficult to develop any sort of dialogue among interested parties.

Critics of notice and comment rulemaking like to point out that "parties participate in the rulemaking process by presenting facts and arguments through procedures [that] develop the factual basis of rules ... [however], policy questions ultimately are decided by the agency."[185] The fact participants can only influence policy decisions by building a rulemaking record supporting their agenda influences what information is presented to the agency, which in turn tends to subvert the ultimate goal of developing sound, broadly supported public policy. Professor Philip Harter, a long time observer of administrative rulemaking procedures outlines the problem as follows:

> Hybrid rulemaking has become a surrogate for direct participation in the political decision because parties have no means of direct participation in the policy choice. Parties can limit the agency's range of choices only by influencing the record. As a result, the process of developing the record has become bitterly adversarial.[186]

He opines procedural posture creates significant impediments to the logical formulation of public policy because, "political decisions necessarily have no purely rational or 'right' answer. Yet, the current regulatory procedures do not permit the parties to participate directly – to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions."[187] Most importantly, "interest groups n*egotiate as supplicants, not as sharers of the ultimate decision*"[188] during

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[185] Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 16 (1982).

[186] *Id.* at 18.

[187] *Id.* at 17.

[188] *Id.* at 33 (emphasis added).

notice and comment rulemaking. This posture tends to limit the range of options parties feel they can realistically propose and discuss. It also limits the agency's ability to develop a truly comprehensive understanding of the practical benefits and deficiencies associated with adoption of a proposed rule.[189] Essentially, "the hybrid process relies on analysis and explanation instead of judgment and compromise among the affected interests."[190] As a result, adversaries who may actually be the ones with the most to gain from creating a system of workable industry regulations that accommodates their interests, can become even more entrenched in their positions. If the regulation in question has the power to transfer of wealth and power among interest groups, the incentive to taking an adversarial stance in the rulemaking process increases accordingly.[191]

This discussion substantially describes the proceedings during the recent anti-circumvention rulemaking. Large numbers of comments were received[192] advocating various exemptions from section 1201, but there does not seem to have been any dialogue among the various parties to determine if there is any middle ground between opposing interests. Take, for example, the issue of "thin copyright" works.[193] As discussed earlier a thin copyright refers to the practice of packaging material

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[189] *See* FOX, *supra* note 184, at § 40[A] (noting that federal agencies may not know about, or fully understand, some industry practices, which means rule drafters "can only speculate how regulations might affect individual businesses or entire industries, let alone consumers. Moreover, these same "officials may fail to grasp the root of a particular regulatory problem, or strain to imagine the range of solutions to it, making it necessary to consult experts in a variety of fields.")

[190] Harter *supra* note 174 at 476.

[191] *See generally id.* at 473.

[192] *See supra* note 163.

[193] Final Rule, at 64566.

unprotected by copyright, such as U.S. government works, unoriginal listings, or matters in the public domain, with enough minimally original material or formatting to obtain a copyright on the new work.[194] Clearly both sides have an interest in this issue. Copyright owners want to preserve the market value derived from their original selection, coordination, and arrangement of unprotected works, while the public at large has an interest in preserving access to a great deal of information contained in these collections; much of which may be unprotected by copyright.

After considering numerous comments about the appropriateness of section 1201 protection for thin copyright works, the Librarian declined to give access to these works an exemption.[195] The rationale seems entirely reasonable. It was the Librarian's opinion that the additional features of these collections are what most users want to access and that there was little evidence access to uncopyrightable material is difficult to obtain at the present time.[196] Therefore, protecting these works under section 1201 was deemed appropriate. But what happens if some of these works do become difficult to obtain outside of a restricted access database? The all or nothing solution still works in a paper-based world, because the consumer is not entirely precluded from engaging in fair use. However, in a digital environment, with extensive use of access controls, the ability to accommodate both interests is much less clear. Granting a blanket exception can just invite hacking of these databases, but a blanket prohibition against all circumvention effectively eliminates the ability to

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[194] *See supra* note 69.

[195] Final Rule, at 64566.

[196] *Id.*

engage in fair use. That is where a dialogue between the competing interests along with technologists could be very useful.

This does not mean traditional notice and comment rulemaking does not serve a useful purpose. On the contrary, the rulemaking conducted by the Librarian seems to have been quite successful in identifying a broad range of issues arising from anti-circumvention legislation. But, identifying the issues is merely a first step. If the objective is reconciliation of competing interests, culminating in the publication of flexible and relevant regulations, which encourage authorship and the public availability of works, the rulemaking must deal with more than just all or nothing solutions.

Critics of traditional rulemaking note that comments received during rulemaking tend to focus on pointing out deficiencies in the proposed rule[197] and, as pointed out in the following excerpt, do not focus efforts toward finding an optimal balance among competing interests.

> Because the agency is the focal point of informal rule making, parties miss opportunities to engage constructively with each other in a sustained way. They often take extreme positions in notice and comment, preferring to posture in anticipation of litigation rather then focus on the regulatory problem posed by the agency. This encourages the agency to compromise or split the difference between competing positions, which can constrain the range of solutions to ... standards that fall somewhere between the poles represented by the parties. Notice and comment also undermines the implementation of rules by failing to encourage dialogue and deliberation among the parties most affected by them.[198]

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[197] FOX, *supra* note 184, at § 40[A].

[198] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11-12 (1997). Other commentators warn that the agency itself is less likely to propose or even consider bold options given the likelihood of review by a court which may not fully understand the issues presented and may be unsympathetic to the agency's position in the matter. *See* McGarity *supra* note 177 at 525-26. *See also* FOX, *supra* note 184, at § 40[A] (interested parties tend to be a small number of well financed trade associations "that feel abused by the rule" are likely to delay implementation through litigation).

In a sense, the focus of agency rulemaking is more about insuring policy decisions made by an agency can or cannot withstand judicial scrutiny instead of encouraging effective public participation in the development of public policy or about arriving at wise solutions that advance the public interest. In some cases the agency may lose site of the ultimate goal since the "tendency is to adopt a cautious approach of ... responding to every conceivable argument raised" rather than mediate the optimal solution.[199]

The more complex the issues involved, the less traditional notice and comment rulemaking seems to encourage logical and deliberate problem solving. "[D]isputes involving many parties and many possible outcomes ... require delicate trade offs among competing interests, they are often resolved through the adversarial process, whose very nature precludes such balancing."[200] Moreover, private parties are not the only ones who can become adversaries. Because the agency will likely have to defend any policy decision in the courts, "the agencies and the private parties tend to take extreme position [toward each other], expecting that they may be pushed toward the middle."[201]

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[199] McGarity *supra* note 177 at 539.

[200] Harter *supra* note 185, at 20. *But see* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1378-79 (1997) (because the agency agrees to publish consensus rules before negotiations begin, rejection of a consensus rule, although authorized, would force the agency to act in bad faith, thereby negating any benefits derived from the negotiation). A similar concern was raised by Judge Posner in USA Group Loan Servs. v. Riley, 82 F.3d 708, 714-15 (7th Cir. 1996) although Professor Funk notes the "court's apparent misunderstanding of the process impeaches its negative impression." *Id.* at 1364. *See infra* note 241.

[201] Harter *supra* note 185, at 19.

While one certainly cannot characterize the relationship between the Librarian and the rulemaking participants as antagonistic, the response of some parties to the final rule is instructive of the points made by these critics of traditional notice and comment rulemaking. The principal focus of comments by opponents of section 1201 is declaring they disagree with the Librarian's viewpoint.[202] Supporters of the legislation do not add anything constructive either. While praising the ruling, they caution against too broad a reading of the two, rather unobjectionable exceptions, actually granted.[203] All in all, the parties merely reinforce their differences.

Returning to the thin copyright example discussed above. To qualify for section 1201 protection of their technical measures, copyright owners might be required to post unenhanced copies of public domain material, incorporated into their copyrighted works, on an open web site. Consumers who want to access the value added parts of the database would have to comply with the terms of the copyright owner's access controls, but the public domain material would still be available. Another alternative might be a rule requiring a party to file a 30-day advance notice of intent to circumvent an access control measure in the case of a database. Under such a rule, the copyright owner would have 30 days to identify alternative sources where the data might be publicly available. If the copyright owner failed to respond within 30 days, then the party would be free to circumvent the access controls.[204] Obviously, these examples do not resolve all the potential concerns, but they are attempts to reconcile competing interests. Under the current rulemaking procedure, neither side

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[202] *See supra* notes 168-169 and accompanying text.

[203] *See supra* note 170 and accompanying text.

talks to the other so it is difficult for anyone to determine what potential solutions are within the realm of possibility.

This kind of inertia and posturing is exactly what Congress sought to avoid by mandating the rulemaking. The entire purpose of this mechanism was to provide for "greater flexibility in enforcement."[205] The idea was to insure that widespread use of technological protection measures did not choke off legitimate access to copyrighted works[206] with the ultimate goal of finding ways to accommodate protections against piracy (and private copying) while taking advantage of the increased access to copyrighted works that digital distribution facilitates. Yet, rather than fostering an ongoing dialogue about how to reconcile both the need for technological protection measures and legitimate access to copyrighted works, traditional rulemaking has produced little but the status quo.

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[204] I am again grateful to Professor Schechter for this example.

[205] H.R. REP. NO. 105-551, pt. 2, at 36.

[206] *See supra* notes 144-147 and accompanying text. Indeed, the whole reason for delaying implementation of section 1201 was "to allow the development of a sufficient record as to how implementation of these technologies is affecting the availability of works in the marketplace for lawful uses." H.R. REP. NO. 105-551, pt. 2, at 37.

IV. A BETTER RULEMAKING PROCESS.

By using notice and comment procedures, to conduct the 1201 rulemaking, the Librarian missed an excellent opportunity to create a permanent forum for dialogue between content owners, equipment manufactures, and information consumers about the proper scope of protection afforded technological protection measures and copyrighted digital works. The Negotiated Rulemaking Act of 1990 (NRA)[207] allows federal agencies to negotiate agency regulations with interested parties. While useful for gathering facts, traditional notice and comment rulemaking does not engender the kind of cooperation needed to reconcile the complex social and economic interests affected by the anti-circumvention prohibitions. The Librarian should use negotiated rulemaking, also known as reg-neg, in subsequent proceedings to design the anti-circumvention exemptions. This methodology, which brings together interested parties in mediated sessions to actually write administrative rules is simply more likely to foster the kind of collaborative effort necessary to reconcile the competing interests of copyright owners and consumers.

For the Librarian to effectively use reg-neg, Congress must also amend DMCA to authorize the him to craft exemptions that advance both the protection of property interests and public availability of copyrighted works. At present, the Librarian is only permitted to grant all or nothing exemptions to the anti-circumvention prohibition. Such limited authority effectively prevents the brokering of compromise agreements and creative solutions that are one of the most beneficial aspects of reg-neg.

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[207] 5 U.S.C. §§ 561-570.

A. BENEFITS OF REG-NEG.

Negotiating anti-circumvention rules in partnership with interested parties has advantages over the process used by the Librarian in his initial rulemaking. By having affected parties share in the development of policy instead of just participating in the process by submitting information or testifying to a committee the focus shifts from one of advocating a particular position, or a set of positions, to a give and take discussion of issues among the affected parties and the Librarian. It opens the door to specific discussions aimed at harmonizing the technological architecture, business models, and consumer needs discussed in the previous part.

This does not mean parties will advocate their positions with less vigor or that one party will suddenly see the virtue of the other side's arguments. Even Professor Harter, one of the most ardent enthusiasts of negotiated rulemaking, warns that "it is ... easy to fall into a 'hot tub' view of negotiations as a method of settling disputes and establishing public policy: [where] everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand."[208] The real benefit to negotiated rulemaking is that rather than just advocating a position to a passive fact finder, parties are forced to "articulate [to each other] why one solution is preferable to another."[209] This interaction changes the very dynamic of the process. The goal is not to avoid conflict, but rather to channel the efforts of

[208] Harter *supra* note 185, at 31.

[209] Freeman *supra* note 198, at 26.

diverse parties into practical problem solving instead of having these parties seek to influence policy just by making themselves heard.[210]

Not all scholars of administrative law are enamored with the concept of regulatory negotiations, however.

> [C]ommentators [are] sharply divided over its effectiveness and legitimacy. Proponents argue that it can be more inclusive than traditional notice-and-comment rulemaking, more 'problem-oriented,' and, at least according to some data, either less costly and less time-consuming than conventional regulation, or no more so.... Detractors claim, by contrast, that reg-neg is more labor- and resource-intensive and more likely to generate litigation than traditional rulemaking. Critics also reject the process on principle, because it appears to surrender rulemaking to explicit interest group bargaining.[211]

Professor William Funk argues that regulatory negotiation can lead to a situation where administrative regulations are nothing more than bargained for exchanges. When a Federal agency fails to exercise independent judgment, it can abdicate its responsibility to define issues and test proposed solutions outside the consensus. In those instances, the law becomes nothing more than a limitation on the range of bargaining rather, than the considered implementation of sound public policy.[212] A related concern is the potential for "capture" raised by Professor Mark Seidenfeld. Capture refers to the situation where "a cozy environment between the regulating

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[210] DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 3 (1995).

[211] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 654-55. Professor Freeman concludes in her article that "reg-neg's proponents worry too little about accountability. But detractors worry too much, or alt least about the wrong things. Reg-neg does not cause private influence in the regulatory process...." *Id.* at 657.

[212] Funk *supra* note 200, at 1374-82.

agency and regulated entities conduces co-option of the administrative apparatus to serve the ends of the entities rather then society as a whole."[213]

Scholars are legitimately concerned about the potential for developing rules that are merely interest group bargains rather than sound public policy. However, the NRA addresses some of these concerns by making the process as open as possible. Even the decision to establish a negotiated rulemaking committee is subject to public scrutiny. The announcement that an agency intends to establish a committee must be published the *Federal Register*, and in other specialized publications as appropriate, such as trade journals or even public web sites. The notice must describe the scope of the rule to be considered, indicate which interests which are likely to be affected, list the proposed representatives, propose an agenda, and solicit comments during a period of no less than 30 calendar days.[214] The notice must also "explain how a person may apply or nominate another person for membership on the committee."[215]

Additionally, "[t]he Federal Advisory Committee Act (FACA)[216] and the Government in the Sunshine Act[217] require any committee be formally chartered, that meetings be open to the public, and that minutes of meetings be kept and made

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[213] Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 421 (2000).

[214] 5 U.S.C. §§ 564(a)(1)-(7). *See also* Seidenfeld *supra* note 176 at 533.

[215] 5 U.S.C. §§ 564(a)(8) & (b) & (c).

[216] 5 U.S.C. app. §§ 1-15. A committees established under NRA must also comply with the FACA. *See* 5 U.S.C. §526(7).

[217] 5 U.S.C. § 552b. Any meeting where deliberations determine or result in the conduct or disposition of agency business must be open to public observation. *See* 5 U.S.C. §552b(a) & (b).

available to the public."[218] The FACA also requires the agency insure a balance of views is represented on the committee.[219] As Professor Harter indicates: "[a] reg neg committee [should not be] just 'the industry' or any one side of the issue. The process is designed to ensure that the full range of concerns, facts, and issues will be raised while developing the rule -- not simply commenting on the draft prepared by the agency."[220] Since reg-neg actually supplements traditional notice and comment rulemaking rather than replacing it[221] the agency must submit any consensus-based rules written by a negotiated rulemaking committee for public comment prior to final implementation.[222] In effect, "no interested party can be entirely excluded from the process."[223] Finally, the NRA also requires the agency independently assess whether any consensus-based rules conflict with its legal obligation to safeguard the public interest throughout the process.[224]

Acknowledging there are statutory requirements, which seek to preserve openness in government and encourage of public scrutiny of the rulemaking process, one may still ask if this framework is enough to allay the concerns of reg-neg critics.

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[218] 5 U.S.C 552b(b), (e) & (f)(2); 5 U.S.C. app. § 5 U.S.C. app. §§ 9(a)(2) & 10(c). *See* Freeman *supra* note 211, at 654. *But see* PRITZKER & DALTON *supra* note 210, at 71-73 (noting meetings of subcommittees, working groups, and caucuses can be held in private so long as meetings where the actual formulation of advice, or rules, take place in public). *See also* Federal Advisory Committee Management, Final Rule, 52 Fed. Reg. 45926 (December 2, 1987) (codified at 41 C.F.R. pt. 106-6).

[219] 5 U.S.C. app. § 5(b)(2)

[220] Philip J. Harter, *First Judicial Review of Reg Neg a Disappointment*, 22-FALL ADMIN. & REG. L. NEWS 1, 12 (1996).

[221] PRITZKER & DALTON *supra* note 210, at 69.

[222] *Id.* at 229. *See also* Freeman *supra* note 211, at 655.

[223] Freeman *supra* note 198, at 39.

[224] PRITZKER & DALTON *supra* note 210, at 230.

After all the federal government publishes thousands of notices, comments, proposed regulations, and final rules every year in the *Federal Register*. That does not mean a significant segment of the public actually knows what is in the *Federal Register*. Moreover, one cannot say a rulemaking granting exemptions to a prohibition on circumventing technical protection measures restricting access to copyrighted works would capture the attention of many people.

Having said that, there seems to be no shortage of public interest in the DMCA rulemaking. The initial rulemaking received almost 400 comments from the public and heard testimony from 34 witnesses representing over 50 different interest groups during five days of hearings.[225] A heightened level of public interest is certainly one that lessens the chances a DMCA rulemaking would merely incorporate bargains between interested parties that do not otherwise serve the public interest. Additionally, Congress has shown a continuing interest in this issue.[226] Concern about the effect of anti-circumvention prohibitions on the public availability of information and electronic commerce is what led to the mandate for a rulemaking mechanism in the first place.[227] At least one member of the House Commerce Committee, which created the mechanism, has also recently expressed concern about the results of the initial rulemaking.[228] Finally, as with any other regulation, DMCA anti-circumvention rules will be subject to judicial review. While one can never exclude the possibility that the rulemaking process will be subverted to serve private

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[225] *See supra* note 163.

[226] *See supra* notes 131-145 and accompanying text. *See also* Bettelheim *supra* note 146, at 715.

[227] *See* H.R. REP. NO. 105-551, pt. 2, at 22.

[228] *See* Boucher *supra* note 168.

interests at the expense of the public good, the procedural safeguards imposed by statute and the high level of interest in this issue substantially lessen the dangers highlighted by Professors Funk and Seidenfeld.

The next anti-circumvention rulemaking is an excellent candidate for use of reg-neg. At present, the parties seem to have diametrically opposite views regarding the appropriateness of section 1201 protection. Neither side seems willing to accommodate the other. But the principle benefit of negotiated rulemaking is forcing diverse parties to work together in writing the rule with which they must all live. Moreover, the copyright law is one that embodies a history of compromise between copyright owners and information consumers.[229] Copyright owners have traditionally had certain rights, now embodied in section 106,[230] but those rights are not absolute. Sections 107-122[231] essentially carve out exceptions to the copyright owner's bundle of rights on behalf of the public. Many of these rights and responsibilities are the product of "heavily negotiated compromises ... among authors, publishers, and others parties with economic interests in the property rights the [1976 Copyright Act] defines."[232]

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[229] *See generally* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

[230] Title 17, U.S.C.

[231] Title 17, U.S.C.

[232] Litman *supra* note 229, at 859-6. For a discussion of the involvement of private parties in the Federal rulemaking process *see generally* Freeman *supra* note 211, at 639-40. "[A]gencies routinely promulgate rules developed, not internally, but by private parties. Private standard-setting groups are so well integrated into the standard setting process that their role appears to give neither administrators nor legal scholars pause.... [P]rivate organizations generate thousands of industrial codes and product standards. Agencies incorporate these by reference, and state governments routinely adopt them.... In some cases, legislation directs agency officials to adopt such standards, as with OSHA in its early years." Other examples of federal agencies adopting private standards include the Food and Drug Administration, the Nuclear Regulatory Commission, and the Federal Aviation Administration. *Id.* at

Professor Litman describes how, over the course of 21 years leading up to the adoption of the 1976 Act, Congress and various Registers of Copyright "encouraged, cajoled, bullied, and threatened ... mediated disputes and demanded combative interests seek common ground ... [and] urged the more intractable controversies be resolved through further negotiations."[233] Some of the more relevant examples of negotiated compromises includes those over the copyright liability of cable television systems where a consensus agreement ultimately led to the creation of the Copyright Royalty Tribunal.[234] Another example is the use of compromise language in section 107, which embodies the fair use doctrine.[235] A more recent example of negotiations leading to the adoption of a workable compromise in copyright legislation is the provision governing online service provider liability passed as part of DMCA.[236] The issue of anti-circumvention protections is no more intractable.

It is certainly possible that participants in an anti-circumvention reg-neg will be hostile to each other, but that alone does not make negotiation impossible. After

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640 n.401. Congress has encouraged the involvement of private parties in the regulatory process in other instances. Professor Harter notes that some agencies are required to accept rules proposed by citizens groups for evaluation pursuant to the Consumer Product Safety Act and Medical Device Amendments of 1976. The Fishery Conservation and Management Act of 1976 and the Securities Acts Amendments of 1975 also authorize rules prescribed by committees of private parties. *See generally* Harter *supra* note 185, at 25-26.

[233] Litman *supra* note 229, at 871-73.

[234] *Id.* at 874-75.

[235] *Id.* at 875-77.

[236] This refers to a series of negotiations overseen by Congressman Goodlatte, and later by Senator Hatch, culminating in the drafting of what became 17 U.S.C. § 512, which regulates the copyright liability of online service providers. *See* S. REP. NO. 105-190, at 4 & 7. *See also supra* note 157 regarding congressional approval and encouragement of the consultative process used by industry to develop uniform technical standards for technological protection measures.

all, hostile parties to lawsuits frequently settle cases.[237] Just like a negotiated settlement, a rulemaking is not a winner take all contest, but choosing not to participate would mean choosing to forgo the opportunity to directly influence the resulting rule and mitigate the damage of an adverse outcome. Additionally, "unanticipated or novel solutions are likely to emerge from face-to-face engagement among knowledgeable parties who would never otherwise share information or devise solutions together."[238] A practitioner involved in a long series of regulatory negotiations explains the benefits as follows:

> The governmental agency obtains additional viewpoints before the rule is promulgated, often reducing the chances of the consideration of highly objectionable provisions or provisions with unintended consequences. Interest groups, long at odds with the government and each other, obtain greater understanding of various viewpoints, often leading to acceptable approaches. All members of a regulatory negotiation committee [begin] to understand how complex and difficult it is to write a rule.[239]

In other words, interested parties can learn from each other when they talk to each other. Experience has shown that "rules [emerging from] reg neg reflect a shop floor insight and expertise. Hence, they can enlist considerable innovation and take account of issues that would likely escape the attention of an agency in traditional rulemaking."[240]

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[237] *See* PRITZKER & DALTON *supra* note 210, at 3.

[238] Freeman *supra* note 198, at 22-23.

[239] Ira C. Lobel, *Lessons to be Learned in Regulatory Negotiations*, 18 ALTERNATIVES TO HIGH COST LITIG. 187 (2000).

[240] Philip J. Harter, *Negotiating Rules and Other Policies: Pay Close Heed to the Structure for Success*, 4 NO. 1 DISP. RESOL. MAG. 15 (1997). Professor Harter also notes there is some indication that negotiated rules can be "more stringent than the agency would have been able to issue on its own, and yet are cheaper to implement precisely because the committee can focus on ways to get the greatest return." *Id.* For a discussion of more recent empirical evidence supporting this contention *see infra* note 243 and accompanying text.

As mentioned above, the objective is to protect both the property owner and the public interest. So how do we actually insure someone like the average high school student, who does not have the financial backing of a university, corporation, or research institution, has the ability to research his term paper while insuring he and 1,000 of his closest friends do not amass the world's largest collection of pirated digital music on their hard drives? To determine if both objectives are achievable requires we consider technical issues, examine the various business models used to disseminate information, and generally grapple with specific proposals. Then, we must consider anticipated changes in these areas driven by technology and the market for copyrighted works. This kind of discussion is simply more likely to take place when interested parties talk *to* each other rather than *at* an agency committee.

From a broader perspective, the negotiation process tends to create a different dynamic between the parties after the rules are adopted. Rather than acting exclusively as adversaries, the parties are thrust into a situation where they are given the responsibility of crafting the legal regime that will govern their interaction and protect their vital interests. Much like the experience with other forms of alternate dispute resolution, the parties can either use this opportunity constructively or find the legal regime imposed upon them.[241]

> Social psychology teaches us that parties are more likely to view outcomes as legitimate when they play a meaningful role in the process. Parties may derive satisfaction not solely from getting what they want in a bargaining process, but from being included in the enterprise, taken seriously, and offered explanations for decisions. Evidence from the most recent study of regulatory

[241] The agency is not *required* to adopt any agreement reached by the negotiating committee. *See* USA Group Loan Services, Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996) (engaging in negotiated rulemaking does not obligate the agency to bargain in good faith). *See also* Freeman *supra* note 211, at 654; Freeman *supra* note 198, at 32 ("broad participation depends upon the agency's ultimate authority to impose its own solutions.").

> negotiation supports such claims. Although speculative, it is reasonable to believe that a direct role in rulemaking will facilitate policy implementation or improve relationships among repeat players, producing payoffs down the line.[242]

In fact, a recent empirical study regarding the use of negotiated rulemaking at the Environmental Protection Agency seems to confirm that there are distinct benefits to giving parties most affected by the rulemaking a significant role in crafting the regulatory regime. The study "concludes that parties to reg-negs believe they produce 'superior' rules and that they are more satisfied with negotiated rules than traditional ones. By giving all parties a stake in the rule, regulatory negotiation is thought to foster commitment to the resulting agreement, which, presumably might facilitate implementation."[243]

Aside from making the rule itself more acceptable, this process lends itself to the creation of "feedback mechanisms through which information can be processed and made operational."[244] Because negotiation requires information sharing and deliberation, it also tends to serve as a "buffer against surprise" reducing uncertainty and instability in the market.[245] Again, such a mechanism is precisely what Congress sought to create when it charged the Librarian to create a process where the balance

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[242] Freeman *supra* note 211, at 656-57.

[243] *Id.* at 655. The unpublished study cited is: CORNELIUS M. KERWIN & LAURA I. LANGBEIN, AN EVALUATION OF NEGOTIATED RULEMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY: PHASE II (1999). These results are consistent with the anecdotal evidence cited by Professor Harter. *See supra* note 240.

[244] Freeman *supra* note 198, at 29.

[245] *Id.* at 29.

between protection of copyrighted materials and legitimate access is continually reevaluated.[246]

Since this rulemaking must take place every three years, fostering this kind of long term, collaborative relationship would be quite beneficial. At its heart, this negotiation process can improve the information flow upon which rules are based by providing all parties immediate feedback about a rule's effects on discrete groups.[247] As one scholar put it, "the disclosure and debate of data is more likely to make better use of available information and expose information gaps.... Moreover, parties have a difficult time insisting on arbitrary or indefensible positions when they are confronted with data or arguments that undermine their view."[248] Ongoing and meaningful participation gives the parties some responsibility for the regulatory regime and provides opportunities for them to raise issues and questions important to their interests as well as formulate potential answers.[249] In more mature stages of negotiations the "sustained interaction is also likely to ameliorate ... adversarialism [and] can also be instrumental in fostering the trust and good faith necessary to overcome setbacks in the implementation process."[250]

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[246] *See supra* notes 144-147 and accompanying text.

[247] Freeman *supra* note 198, at 27.

[248] *Id.* at 23.

[249] *Id.* at 27.

[250] *Id.* at 24.

B. STATUTORY REVISION.

The NRA gives the Register independent statutory authority to conduct regulatory negotiations.[251] However, the language in section 1201 and the legislative history of that provision limits the scope of the Librarian's authority to such an extent that interested parties may have no incentive to engage in negotiated rulemaking. Therefore, Congress should amend section 1201(a)(1)(D) to expand the Librarian's authority to to enable the brokering of legitimate and meaningful compromises that protect both property rights and fair use.

This issue arises because, under the current statutory scheme, the Librarian can do no more than grant or deny a section 1201 exemptions. Section 1201(a)(1)(D) only permits the Librarian to determine "whether users of particular classes of works are likely to be adversely affected by the prohibition in their ability to make noninfringing uses."[252] Since the NRA requires a Federal agency engaging in negotiated rulemaking to determine whether consensus reached by the parties is consistent with its own legal obligation,[253] this language would severely limit the Librarian's ability to accept any consensus based compromise solutions. This interpretation is bolstered by the legislative history, where the drafters of this rulemaking mechanism expressed their intent to limit the Librarian's authority to change definitions, limitations, and defenses ensure the regulation "conform[s] in

[251] *See* FOX, *supra* note 184, at § 40[A].

[252] Final Rule, at 64556.

[253] 5 U.S.C. §563(a)(7).

every particular to the provisions of the statute."[254] An amended provision could read as follows:

> (D) The Librarian shall publish ~~any class~~ *uses* of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing use~~s~~ by persons who are users of are copyrighted work, are or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply of such users with respect to such class of works for the ensuing 3-year period.

The legislative history is also somewhat ambiguous regarding the form of rulemaking Congress intended the Librarian conduct. Comments in the Conference Committee report indicate a preference for formal rulemaking, "as is typical with other rulemakings under Title 17 ... including providing notice of the rulemaking, seeking comments from the public...."[255] This language could be read as a requirement to engage in formal notice and comment rulemaking. Given the general tone of DMCA's legislative history, and the existence of independent statutory authority to conduct negotiated rulemaking, this seems too narrow a reading, but clarification encouraging use of reg-neg would eliminate the issue.

C. CONDUCTING THE RULEMAKING

Prior to conducting negotiated rulemaking the agency head must determine "that the use of the negotiated rulemaking procedure is in the public interest"[256] in light of seven statutory factors. First, the agency must find there is a need for a rule.

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[254] H.R. REP. NO. 105-551, pt. 2, at 36-37. *See generally supra* notes 149-150 and accompanying text.

[255] H.R. CONF. REP. NO. 105-796, at 64.

In this case, Congress has already answered this question by requiring administrative rulemaking.[257] Other factors include whether a balanced and limited number of identifiable parties significantly affected by the rule are likely to bargain in good faith to reach a consensus on a proposed rule within a fixed period of time.[258] The agency must also determine that the negotiated rulemaking will not unreasonably delay issuance of a final rule.[259] Finally, the agency must be willing to commit resources to the committee as needed, and agree to use the consensus of the committee as the basis of the proposed rule to the extent possible consistent with their legal obligations.[260]

In this instance, Congress tentatively identified many of the interested parties during legislative negotiations. These parties include "libraries, universities, small businesses, online and Internet service providers, telephone companies, computer users, broadcasters, content providers, and device manufactures."[261] However, the initial evaluation of what constitutes optimal composition of a committee does not stop there. Usually, "[t]he agency ... initiates the process after determining, through public meetings or informal consultation, that there is sufficient interest among the most affected groups."[262] This convening process itself is more deliberative than may first be envisioned, as noted here:

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[256] 5 U.S.C. § 563(a)(1).

[257] H.R. REP. NO. 105-551, pt. 2, at 36-37.

[258] 5 U.S.C. §§ 563(a)(2)-(4).

[259] 5 U.S.C. §§ 563(a)(5).

[260] 5 U.S.C. §§ 563(a)(6)-(7).

[261] 144 Cong. Rec. S4439 (statement of Senator Hatch)

[262] Freeman *supra* note 198, at 38. Because the convening procedure is not statutorily prescribed outside parties can also propose chartering a committee.

> A proper convening ... is a form of outreach in which the agency seeks diverse representatives to take part in the development of the rule from the ground up. As a result, a far greater range of interests actually participate in the rule than in customary notice-and-comment rulemaking in which the agency passively receives comments.[263]

A convener[264] will typically canvass potential participants, interview them, and recommend the makeup of the committee to the agency.[265] Committee members "typically include[] a balance of interests with technical capacity and a demonstrated history of involvement in the underlying issue. Those with the greatest expertise are important not only because of what they might contribute to the process, but also because they often posses either the knowledge or resources to block the rule through legal challenge."[266]

A DMCA committee would certainly include representation from the major copyright industries such as publishers, music producers, motion picture studios, and software developers. Other members could include Internet Service Providers, consumer electronics manufactures, libraries, universities, research institutions, and news organizations. Equally important will be to represent our intrepid high school student. The average consumer who must rely on his or her own devices to do research, learn about current events, or just expand his or her horizons by reading, listening to music or watching movies. The same consumer whose private copying of

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[263] Harter *supra* note 240, at 15.

[264] 5 U.S.C. § 562(3) (a person who impartially assists the agency in determining the feasibility of establishing a negotiated rulemaking committee) The convener can be "an agency official or an independent third party with experience in dispute resolution and charges him or her with determining which parties should participate." Lobel *supra* note 239, at 187.

[265] *See generally* Lobel *supra* note 239, at 187. This article discusses the process used by the conveners to canvas potential interest groups and help the agency ultimately decide who would participate in direct negotiations.

[266] Freeman *supra* note 211, at 645.

digital works, arguably, poses a more significant threat to the value of copyrighted works than deliberate piracy. This group could be represented by interest groups, like the Consumer's Union, which submitted comments during the recent rulemaking. Another possibility is to have their interest represented by educators such as college professors. I would also recommend the inclusion of an educator with experience in secondary education who can speak to the difficulties faced by the average individual who works or studies in an environment where funding a proliferation of access charges is simply not possible.[267]

Once a sufficiently diverse and balanced committee is empanelled, the issue becomes one of achieving consensus on the proposed rule among the parties. Indeed, the likelihood of achieving a consensus is a key factor in deciding whether or not negotiated rulemaking is appropriate.[268] Federal agencies have found that using mediators or facilitators skilled in dispute resolution techniques has "invariably been helpful"[269] in this regard. Such a person can be the same individual or individuals who acts as the convener. He or she can be a subject matter expert or just an expert in mediation techniques. Another alternative is to use the services of the Federal Mediation and Conciliation Service. The most important criteria is that the parties see the individual or group as "neutral."

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[267] *See* PRITZKER & DALTON *supra* note 210, at 4 (noting that regulatory negotiations can enfranchise parties with important interests who may be relatively quiet or feel powerless during rulemaking procedures). Authority for the Librarian to provide services, facilities, and even payment of committee member expenses can be found in 5 U.S.C. § 568.

[268] 5 U.S.C. § 563(a)(4) & (5).

[269] *See* PRITZKER & DALTON *supra* note 210, at 8 & 129. The Negotiated Rulemaking Act assumes a facilitator will be used to chair the committee, keep minutes, etc. *See* 5 U.S.C. § 566.

In the absence of an agreed upon definition of consensus, the statute requires unanimity among the parties.[270] "Committees usually avoid ... stalemates through creative definitions of unanimity that allow parties to disagree without dissenting from the entire agreement."[271] Some examples include consensus defined as "simple majority votes [with] 'no substantial disagreement' or as 'no significant disagreement.'"[272] As noted previously, the agency also has considerable flexibility when it comes to dealing with the issue of consensus. "In the event that negotiations require unanimous agreement ... the agency may simply withdraw, promulgate the rule on its own, and accord any general consensus that emerged some deference by incorporating it into the rule. The agency's decision to end a negotiated rule making is not subject to judicial review."[273] Professor Harter, for one, cautions against straying too far from the statutory definition of consensus.

> [E]ach interest must determine that the rule, when viewed as a whole, it is at least minimally acceptable.... This dynamic ... plays an important role in knitting the committee together into a group with the common goal of developing a mutually acceptable outcome....
> ....
>
> [I]f the definition of consensus is modified to require less than unanimity or if no attempt is made to reach full closure ... the parties are likely to put forth their positions ... as opposed to developing underlying interests or needs that might be addressed by means other then their articulated positions.[274]

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[270] 5 U.S.C. § 562(2) (if not unanimity consensus can mean general, but not unanimous concurrence or any other agreed upon definition).

[271] Freeman *supra* note 198, at 40.

[272] *Id.* at 40 n.111 (definitions of consensus not requiring unanimity permit an agreement not to challenge the rule even if some parties do not affirmatively support it).

[273] *Id* at 40.

[274] Harter *supra* note 240, at 16-17.

He explains "[t]he Negotiated Rulemaking Act explicitly requires the agency to consider whether it is prepared to [publish a committee agreement as a proposed rule] 'to the maximum extent possible consistent with the legal obligations of the agency.' Thus it is not the committee that is imposing its will on an involuntary agency, but rather the decision of the officer of the United States to adopt the proposal."[275]

[275] Harter *supra* note 220, at 12-13.

V. CONCLUSION.

When it passed DMCA, Congress specifically sought to protect copyright owners against the threat of piracy and private copying. Yet, it was sufficiently concerned that sanctioning ironclad access controls on copyrighted works could stifle fair use and therefore the public availability of information. Therefore, it created a mechanism, which would allow the government to periodically adjust the scope of protection afforded access control measures as needed.

The rulemaking mechanism initially used by the Librarian is not the most effective way to accomplish this objective. Traditional notice and comment rulemaking does not give affected parties a meaningful stake in the rulemaking process. Use of negotiated rulemaking, which is authorized by Federal law, is a superior way to effectuate the congressional purpose of reconciling the interests of copyright owners and users of copyrighted material. In order for the Librarian to use reg-neg, however, Congress must amend DMCA to permit the librarian to broker meaningful compromises between interested parties that both protect property rights and preserve fair use.